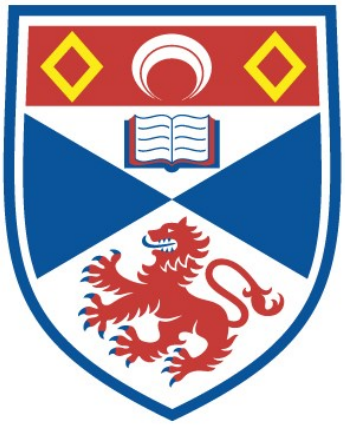
ECCLESIASTICAL JURISDICTION IN MID 16TH CENTURY SCOTLAND WITH SPECIAL REFERENCE TO THE OFFICIALS OF ST. ANDREWS, 1540-1550

S. D. Ollivant

A Thesis Submitted for the Degree of PhD
at the
University of St Andrews



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by

S.D. OLLIVANT

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ABSTRACT

The officials of St Andrews exercised in contested disputes a jurisdiction delegated by the bishop in his role as 'ordinary'; it was an authority co-extensive with that of the bishop but excluded the ordinary's jurisdiction in correctional matters, which was delegated to other officers. Officials appeared in most Scottish dioceses during the course of the thirteenth century, and by their specialist skills soon acquired the responsibility in jurisdiction that had formerly pertained either to groups of clergy acting collectively, or to other episcopal officers such as the archdeacon. The venue of the official's work developed from the meetings of chapters to more comprehensive consistories, and finally to an established court with regular sessions. By the sixteenth century these courts were professionally staffed: the procurator fiscal had an important role in both advocacy and prosecution, while skilled procurators were available to represent clients in court.

Court procedure could be highly complex, but in addition to the multiple stages of plenary procedure there were also forms of summary process which offered cheaper and more immediate settlements of disputes. Actions concerning the church or its priests were common, but the courts dealt more with the recovery of private debts, the settlement of testamentary matters and the regulation of contracts; the registration of acts of monition was also an important service to the minor financial transactions of the community. The officials and procurators were closely involved in the operation of the civil courts, and the ecclesiastical jurisdiction clearly represented an integral part of the national judicial system. The church courts were not, however, immune to criticism. In addition to acts of public violence the church lawyers faced much criticism of the delays and expense of their system. Certainly plenary procedure discriminated in favour of the wealthier suitors, but there were short forms of judicial process available, and there is no sign of regular appeals to Rome.

Remaining relatively unmoved in times of national crisis, the church courts played an important role in the social and commercial affairs of ordinary people in sixteenth-century Scotland, and show no sign of decline less than a decade before the Reformation. Much of the system, both in practice and personnel, survived the religious revolution intact and played an influential part in the subsequent development of Scots Law.

D E C L A R A T I O N

The following thesis is entirely my own composition and represents the results of research carried out by myself alone; it has been neither submitted nor accepted in any previous application for a higher degree.

I undertook the work as a research student in the department of Mediaeval History of the University of St Andrews, having been admitted in October 1975 under Ordinance General No. 12, and on 25 June 1976 as a candidate for the degree of Doctor of Philosophy under the terms of the Resolution of the University Court, 1967, No. 1.

Simon D. Ollivant

As the candidate's supervisor I declare that the conditions of the Resolution and Regulations governing the award of the degree of Doctor of Philosophy in the University of St Andrews have been fulfilled by the above-named candidate.

Donald E.R. Watt

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EDITORIAL NOTES

1. The sources for this thesis are found in three languages - Latin, Scots and modern English. In citing them a distinction has been made first of all between manuscripts and published works: in the case of the former all extracts have been rendered in modern English, with the original given in a footnote where it may prove helpful. In the case of printed works those that are in Scots are cited in that form, while those that are in Latin are rendered in my own English translation; those that are printed in English are cited unchanged. An exception has been made in the case of William Hay's Lectures where the editor has provided an excellent parallel English text which has been used when quoting that work.

2. References to the Lothian Act Book (Acta I) can sometimes be hard to locate; in such cases, and where the particular entry has not been described in the text, the names of the parties to the suit are given. These names are given in their modern form where such a form is obvious (e.g. Brown for Broune, Abercromby for Abircrummy). Where the names of either persons or places occur in direct quotations from the sources they are left in their original form.

A B B R E V I A T I O N S

(i) MANUSCRIPTS

Acta I	Act Book of the official of Lothian, 1546-49.
Acta II	Act Book of the official of Lothian, 1550-53.
Chapel Royal Acta	Act Book of the commissary of the chapel royal at Stirling, 1549-50.
Dunblane Acta	Act Book of the commissary of Dunblane, 1551-1555.
Sent. Laud.	Sentence Book of the official of Lothian, 1513-51.
Sent. St A.	Sentence Book of the official principal of St Andrews, 1541-53.
Stirling Acta	Act Book of the commissary of Stirling, 1548-1552.

(ii) PRINTED BOOKS

Acta Admirallatus	Acta Curiae Admirallatus Scotiae, 1557-62.
Acta Sessionis (Stair)	Selected Cases from Acta Dominorum Concilii et Sessionis, 1532-33.
ADC	The Acts of the Lords of Council in Civil Causes.
ADCP	Acts of the Lords of Council in Public Affairs, 1501-54.
APS	The Acts of the Parliaments of Scotland.
Arbroath Liber	Liber S. Thome de Aberbrothoc.
BP	The Practicks of Sir James Balfour of Sir James Balfour of Pittendreich.
Cambuskenneth Registrum	Registrum Monasterii S. Marie de Cambuskenneth.

DDC	Dictionnaire de Droit Canonique.
Dunfermline Registrum	Registrum de Dunfermlyn.
EHR	English Historical Review.
Fife Court Book	The Sheriff Court Book of Fife, 1515-22.
Fraser, Eglinton	Fraser, W., Memorials of the Montgomeries Earls of Eglinton.
Glasgow Registrum	Registrum Episcopatus Glasguensis.
Herkless and Hannay, Archbishops	Herkless, J., and Hannay, R.K., The Archbishops of St. Andrews.
Patrick, Statutes	Statutes of the Scottish Church.
RMS	Registrum Magni Sigilli Regum Scotorum.
RPC	The Register of the Privy Council of Scotland.
RSCHS	Records of the Scottish Church History Society.
St A. Acta	Acta Facultatis Artium Universitatis Sancti Andree, 1413-1588.
St A. Form.	St Andrews Formulare.
St A. Lib.	Liber Cartarum Prioratus Sancti Andree.
St A. Offic.	Liber Officialis Sancti Andree.
St A. Rent.	Rentale Sancti Andree.
Scottish Legal History	An Introduction to Scottish Legal History.
SES	Concilia Scotiae: Statuta Ecclesiae Scoticanae.
SHS	Scottish History Society.
Sources of Scots Law	An Introductory Survey to the Sources and Literature of Scots Law.
SRS	Scottish Record Society.
STS	Scottish Text Society.
Watt, Fasti	Watt, D.E.R., Fasti Ecclesiae Scoticanae Medii Aevi.

INTRODUCTION

I N T R O D U C T I O N

On 24 August 1560 the Scottish parliament declared that:

> 'the bischope of Rome hais na Jurisdictioun nor autoritie within this realme in tymes cuming ... and that na bischop nor uther prelat of this realme use ony Jurisdictioun in tymes to cum be the said bischop of Romeis autoritie.'[1]

To anyone unfamiliar with the history of the church courts this declaration might appear as only a minor detail of the great upheaval of the Reformation, a mere dotting of i's and crossing of t's; but this was not so. Although its constitutional validity may have been questionable and its immediate effects limited,[2] the potential of this statute was sweeping, and it carried with it the very real risk of judicial anarchy in Scotland. The jurisdiction of the pre-Reformation ecclesiastical courts extended into every part of Scotland and over almost every aspect of human affairs, and the courts of the ecclesiastical judges were among the most important in the land. In abolishing the jurisdiction of the pope parliament called into question the validity of all consistorial jurisdiction and threatened not only to dismantle an organization that had evolved over four centuries, but also to remove one of the integral parts of the judicial system of sixteenth-century Scotland.

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1. APS, ii, pp.534-5.
2. Cf. G. Donaldson, The Scottish Reformation (Cambridge, 1960), pp.60,67.

The story of the church courts in the final years of their pre-eminence is the subject of this thesis. It is a story that has been strangely neglected by historians - a neglect that is only partly justified by the meagre quantity of the surviving records. The purpose of this thesis is to consider these records and to examine the church courts in the diocese of St Andrews in the decade of the 1540s and thereby, it is hoped, go some little way towards rectifying the historical balance.

Curiously, our starting point is not in those records at all but in a piece of fifteenth-century poetry called 'The Tale of the Dog, the Sheep and the Wolf'. The author, Robert Henryson, had a particular talent for rendering the fables of Aesop not only in the vernacular of his time but also in the terms of contemporary society and circumstances; the result was a literary form of enormous satirical potential.[1] This particular fable, which is given in full below,[2] tells the story of a poor sheep who was summoned to court on a trumped-up charge. Not only was his opponent, the dog, dishonest, but so also were the judge and other members of the court, and the fable ends with the sheep shorn of his fleece in the middle of winter and even more destitute than before. The particular interest of this story for us is that the court described by Henryson is a church court. In the eighteenth-century the lawyer and antiquary David Dalrymple, Lord Hailes, edited a volume of early

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1. Cf. The Poems and Fables of Robert Henryson, ed. H.H. Wood (Edinburgh, 1958).
2. See below, Appendix I, 333-9.

Scots poetry which included this fable by Henryson and in his notes he commented:

> 'It contains the form of process before the ecclesiastical court. It is a singular performance, will be entertaining to lawyers, and may, perhaps contain some observations not to be found in books.'[1]

It is, perhaps, a surprising suggestion that a piece of popular fifteenth-century poetry should have anything to contribute to our understanding of ecclesiastical jurisdiction, but coming from one whose opinion was considered by Dr Johnson to be that best worth having on Scots law and history,[2] it is not to be lightly dismissed. Then almost exactly a century later another eminent legal antiquary returned to the same theme in one of a series of lectures given to the Juridical Society. Cosmo Innes concluded his lecture on 'Old Forms of Law' by relating to his audience the tale of the unfortunate sheep 'as the best account we have of the jurisdiction and form of process in the Consistorial Court'.[3] This was an even more strange statement; Innes himself had edited the only published selection from the pre-Reformation court records and his introduction to the volume remains today an important guide to the whole field of ecclesiastical jurisdiction.

It must be said, however, that Innes was not entirely correct. The general provincial council of the Scottish church held

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1. Ancient Scottish Poems, published from the manuscript of George Bannatyne, ed. D. Dalrymple, Lord Hailes (Edinburgh, 1770), p.280.
2. Dictionary of National Biography, ed. L. Stephens, S. Lee (London, 1917), v, 404. (Hereafter cited as DNB).
3. C. Innes, Lectures on Scotch Legal Antiquities (Edinburgh, 1872), p.239.

in Edinburgh in 1549 devoted nine statutes to the regulation and reformation of the process in the consistorial courts, and included a lengthy step-by-step example in very much greater detail than that attempted by Henryson;[1] indeed a similar statement had been made by parliament as early as 1427 in an attempt to curb the protracted and expensive procedure of the church courts.[2] If neither of these accounts recommended themselves to Innes on the grounds that they represented ideals of what ought to happen rather than records of what actually did happen, then there remained at least one other literary source to draw on. The 'Satire of the Three Estates' by David Lindsay[3] also contained an attack on the church courts, although aimed more at their inefficiency and expense than at any suggestion of blatant partiality, and in one section it records a long list of procedural steps by their proper Latin names.[4] Nevertheless, if Innes exaggerated somewhat in saying that Henryson's poem was the 'best account' available of church court and procedure, he was probably right to do so; a little gentle chiding of his distinguished colleagues was not out of place when so many of them must have been lamentably ignorant of one of the most important factors in the development of their own legal system.

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1. SES, ii, p.124-5.
2. APS, ii, p.14.
3. The Works of Sir David Lindsay of the Mount 1490-1555, ed. D. Hamer (STS, 1930-36), ii. For Lindsay's biographical details cf. DNB, xi, pp.1168-74.
4. Lindsay, Works, ii, p.289. Cf. below, p.288.

Innes's own work was confined to a general introduction to the subject of the church courts together with a careful selection of material relating to one particular, and not very representative, aspect of court business. He was, however, sufficiently well acquainted with the subject as a whole to appreciate the role of the courts in the administration of justice. 'You need not be surprised', he told his audience, 'that the business of the Officials' Courts of Glasgow, St Andrews, Edinburgh, was larger and of more importance than the business transacted in all the Sheriff Courts, where there were, you know, no lawyers, and greater also than the King's Council or the Judicial Committee of Parliament, with its occasional sittings, could ever have transacted'.[1] While this judgement has been generally accepted by more recent writers, work on the subject has tended to take the form either of a general introduction[2] or of a detailed treatment of a particular aspect of court business.[3] The subject thus remains tantalisingly vague: on the one hand we have Innes's assertion that the ecclesiastical courts were, as late as the sixteenth century, the busiest in the land; on the other, we find that for much of our information on these courts we must turn to the works of mediaeval

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1. Innes, Antiquities, p.239.
2. E.g. F.P. Walton, 'The Courts of the Officials and the Commissary Courts, 1512-1830', Sources of Scots Law, pp.133-43; G. Donaldson, 'The Church Courts', Scottish Legal History, pp.363-7.
3. E.g. A.E. Anton, 'Mediaeval Scottish Executors and the Courts Spiritual', Juridical Review, lxvii (1955), pp.129-54.

poetry. The resolution of this apparent anomaly has been the guiding principle of this thesis. The records are there to be consulted and although they are limited both in time (to a period of little more than forty years) and geographically (almost exclusively to the diocese of St Andrews), it remains for us to discover what they can add to our knowledge of ecclesiastical jurisdiction in the sixteenth century.

Before turning to the records themselves, however, we should consider the development of the courts which produced them. It is clear from Innes's description of the amount of business conducted by the church courts that the system which they represented was both highly developed and wide-spread. More recent research has confirmed the extent at least of the ecclesiastical jurisdiction: it is sobering to realise, for example, that during the 1540s some 150 officials and commissaries exercised judicial functions in the church courts of Scotland.[1] The origins of so great an institution are therefore a primary concern. Not less important is to decide just what were the relative responsibilities of all these different judicial officers. There were officials, officials general and officials principal, commissaries general and special, commissaries of 'the greater excesses' and commissaries with territorial titles; in addition, judicial functions were exercised by vicars general, by archdeacons and by rural deans, while the bishop himself often presided in court. The picture is further complicated by the activities of judges delegate and sub-delegate

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1. Cf. Watt, Fasti, passim.

acting by virtue of commissions from the Holy See. Each individual strand must be disentangled before we can distinguish the particular field of the officials' jurisdiction which forms the focus of our inquiry.

Given this background to the officials' jurisdiction we should consider secondly the courts over which they presided. The church courts of the sixteenth century were well-organised and comparatively complex affairs. They were not created over-night but rather, the evidence suggests, were the result of a slow evolution from much simpler beginnings, such as the occasional gatherings of local clergy at a chapter of a consistory. The sources for the thirteenth and fourteenth centuries are extremely meagre, but it is possible to follow a clear line of development to the courts of the sixteenth-century officials. As they developed so the courts acquired their own rules and customs, but even in the later centuries the sources have little to tell us about their actual form and organisation: to Henryson they were the 'cursit consistorie'[1] and Lindsay wrote of their 'great defame',[2] while even Innes's praise says little about the reality of the courts as working tribunals. How often did the court sit during the week, and at what time? When was it in session, and when in vacation? Innes's published material contains little of value here because the Sentence Books from which he made his selection are only erratically dated, and the cases in

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1. See below, Appendix 1, p.338, 141.
2. Linsay, Works, ii, p.291, l.3080.

which he was interested occur at random throughout the whole forty years of the records. In this respect the evidence of the Act Books of the official of Lothian and the commissary general of Dunblane[1] is of particular importance and the regular daily entries spread over a period of some years makes it possible to obtain a clear picture both of the customs of each individual court and of the practices that appear to have been common to both.

The real constituents of any court are, of course, the judge and other officers who run it. In the case of the ecclesiastical courts we are again confronted by two poles of opinion: Henryson described the 'fraudfull wolf' and his corrupt associates; Innes emphasised the 'high character' obtained by the church courts for the 'learning and impartiality of their decisions'.[2] There is no evidence that will show us the hearts of the sixteenth-century officials, but by looking at the careers of some of the St Andrews' officials it is possible to learn a great deal about the type of man who presided over the ecclesiastical courts of that diocese and about their many qualifications. It is possible also to shed some light on the roles of other officers in the courts; on the procurator fiscal and on the large body of expert and active procurators, or advocates, who made their living pleading in the courts spiritual.

The next questions to be asked concern the types of business conducted in the officials' courts. It is clear from even a

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1. See below, 15-16, 21-23.
2. St A. Offic., ix.

cursory examination of the records that the sentences of matrimony and 'status' printed by Innes form only a small proportion of business as a whole; indeed, Innes himself was the first to admit that the jurisdiction of the church courts had extended over 'a great proportion of purely civil questions'.[1] More recently it has been demonstrated by Professor Donaldson that, in terms of judicial sentences at least, a large proportion of officials' court business had very little to do with what might be imagined to be the direct interests of the church.[2] Actions concerning the payment of teinds or the possession of benefices, or even actions of a moral nature such as concerned matrimony or slander, are few in comparison to the great number which concern debt or the fulfilment of an obligation. The precise patterns of court business clearly have much to tell us about the court itself, and although we must take care not to seek too precise a distinction between 'church business' and 'lay business' we must consider the extent to which this marked involvement in the affairs of the laity affected the role of the church's jurisdiction in contemporary society.

Narrowing the focus a little more closely on the working life of the courts there is much to be learnt about the practice and procedure by which the various types of action were contested. The examination of church court procedure is of more than purely pedantic

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1. Ibid., ix.
2. Donaldson, 'Church Courts', 365-6.

or antiquarian interest. Apart from anything else the ability to disentangle the complicated and often confusing system of procedure is an invaluable aid to using and understanding the Act Books. More generally, however, the courts represented one of the most important administrative functions of the pre-Reformation church and as such reflect the strengths and weaknesses of that church, particularly in times of crisis; the ability to maintain a complex judicial system at such times may be a significant indicator of the state of the machinery of the church as a whole. A knowledge of the actual procedural practice of the courts may also help us to resolve the apparent conflict between the nineteenth century's appreciation of legal excellence and contemporary criticisms of delay and inefficiency. Finally, although there is neither the space nor the legal expertise to follow the matter to its conclusion in this thesis, an understanding of church court practices may help to show the way to a greater appreciation of the role of the ecclesiastical lawyers in the development of Scots law.

Criticism of the delays in church court procedure was often focused particularly on the use, or abuse, of appeals. Appeals within the ecclesiastical jurisdiction may be broadly divided into two categories: appeals made to the official principal of St Andrews from either the court of the official of Lothian or from the courts of other ecclesiastical judges within the province of St Andrews (and occasionally from within the province of Glasgow), and appeals

made from the court of the official principal to the Holy See. It is with the former category that we are most concerned since the latter, except where there is a record of such an appeal being disallowed, have no place in the official's court records. Appeals are both a strength and weakness of a judicial system: a strength in that they provide redress for injustices, real or imagined, suffered in a lower court, and a weakness in that their abuse can frustrate justice by interminable delay and can diminish the authority of a judge whose decisions are thus called into question. The maintenance of a just balance is thus an important test of the health of any judicial system.

Of all these aspects of the working of the church courts it is perhaps the social significance that will be of greatest interest to historians. The particular area of our study, the 1540s, was a period of great crisis not only for Scotland as a whole but also, in retrospect, for the church. Individual events of that decade, such as the murder of Cardinal Beaton in 1546, are perhaps of less significance than the fact that the great volume of business recorded in the Act Book of the official of Lothian took place only twelve or thirteen years before episcopal jurisdiction was abolished by parliament. The detailed record of the Act Books clearly has much to tell us, both as regards the state of the church itself and as regards its relations with society as a whole, relations which were shortly to be thrown into confusion. There are many questions to be asked, but perhaps some topics stand out in

particular. We may consider the relation of the ecclesiastical jurisdiction to the courts of the civil authority - those courts whose business, according to Cosmo Innes, was so much less than that of the officials. We may consider the relationship of the church courts to the ordinary people and whether or not popular criticism of the courts was justified. We should consider the means of the courts to enforce their will and the authority such means may have carried within the community. Finally, we should look briefly at the history of the church courts during the troubled years covered by the records.

The surviving pre-Reformation church court records are important sources for Scottish history, both in the particular field of ecclesiastical jurisdiction and in the wider field of social history. They offer many potential subjects for further study. This thesis cannot pretend to be more than an introduction to the subjects outlined above; it is hoped to draw some conclusions and point the way toward others. Above all, this thesis does not pretend to be the last word on the matter; it is more of a beginning which, it is hoped, will lead the way to much profitable research in the future.

THE SOURCES

THE SOURCES

1. THE RECORDS OF THE PRE-REFORMATION CHURCH COURTS

It is now more than forty years since the Stair Society published its survey of the sources and literature of Scots law,[1] and as it remains a standard work of reference, our discussion of the church court records may usefully be combined with a reappraisal of the information contained in that volume on the subject of the officials' courts, in the article contributed by F.P. Walton.[2] Walton gave the following list as 'the reports of officials' courts, 1512-1554':

'(1) Liber Sententiarum Officialis S. Andree principalis, 1 vol., 1541 to 1553.

(2) Liber Actorum Officialis S. Andree infra Laudonie, 1 vol., 1546 to 1548.

(3) Liber Sententiarum Officialis S. Andree infra Laudoniam, 1 vol., 1513 to 1551, with a fragment dated 1522 to 1544.

(4) Liber Actorum Officialis S. Andree infra Laudoniam, 1 vol., 1551 to 1553. The front page is missing, and the book is difficult to read. The backing says infra Laudoniam, but there may be doubt as to this. It is not mentioned by Cosmo Innes.

(5) Constitutiones Procuratorum in Curia Consistoriali S. Andree, 1 vol., 1564 to 1566'.[3]

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1. Sources of Scots Law.
2. Walton, 'Officials' and Commissary Courts', pp.133-53.
3. Ibid., p.135.

This list requires some adjustment. In the first place, the fragment mentioned in item three consists in fact of two fragments; one, taken from the principal's Sentence Book, dates from 1541 to 1544 while the other, taken from the Lothian Sentence Book, dates from 1513 to 1522. Secondly, it soon becomes clear that Walton's list follows that of an earlier scholar, Matthew Livingstone, who produced a guide to Scottish records in 1905.[1] Livingstone was responsible for two mistakes. The first was that the volume listed by Walton as item five does not refer to the pre-Reformation church courts at all, but to the reformed courts in St Andrews. Secondly, Livingstone omits a number of other significant pre-Reformation court records. Two of these volumes relate to the court of the commissary general of Dunblane, one to the commissariot of Stirling and one to the commissariot of the chapel royal at Stirling. Confused, no doubt, by the title 'commissary', Livingstone assigned these records to the reformed commissariot courts;[2] although this surprising conclusion followed hard on Livingstone's own comments on the establishment of the reformed courts in 1563,[3] this mistake was repeated by Walton.

Each of these surviving records will now be considered in turn. The order followed is that in which the volumes are catalogued in Register House in Edinburgh, with the single exception of item two on Walton's list, which is incorrectly catalogued.[4]

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1. M. Livingstone, A Guide to the Public Records of Scotland (Edinburgh, 1905).
2. Ibid., pp.116,128.
3. Ibid., p.107.
4. See below, p.21n.

(i) The Act Book of the Commissary Court of the Bishop of Dunblane, 1551 to 1555 (SRO, CH5/1/1, CH5/1/2).

This record is now bound in two volumes although originally it was a single volume of dimensions similar to those of the first Lothian Act Book (hereafter referred to as 'Acta I'). Measuring sixteen inches by six inches, the folios are numbered continuously from one to 217 in the first volume and from 218 to 429 in the second; the whole record will be referred to as the 'Dunblane Acta'.[1] This source has been surprisingly neglected, although Livingstone's mistake was partly corrected by his successor in that field, J.M. Thomson, who referred to it briefly as an 'Act Book of the Official of Dunblane'.[2] Such disregard gives a false impression of the importance of the Dunblane Acta, although there does exist an unpublished appreciation of the volume, prepared for the use of the Scottish Record Office, which does it more justice by providing a good descriptive introduction and by emphasising its potential value as a source for social history.[3]

The Dunblane Acta presents a very neat appearance, much superior to the comparable Lothian Acta I, and appears to have been written largely in just one hand - probably that of William Blackwood.[4] It consists of daily entries each of which is headed by a note of the date and of the identity of the presiding judge.

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1. No distinction will be made in references between the two volumes. For ease of consultation it should be remembered that folios 1-217 are bound as CH5/1/1 and folios 218-429 as CH5/1/2.
2. J.M. Thomson, The Public Records of Scotland (Glasgow, 1922), p.114.
3. SRO, Office File no. H/69.
4. Cf. below, p.129. This is also the conclusion of the author of file H/69.

The individual entries record either judicial acts such as acts of monition,[1] which begin with the words 'quo die ...', or the successive diets of actions then in progress. In the latter case the entries are introduced by 'quo die ...' when the action is first initiated and then subsequently by the words 'in causa ...'. It has not been possible to examine these records in as great detail as the St Andrews court books but they have yielded valuable comparative material for the Lothian Acta. The Dunblane Acta offer enormous scope for further study and it is hoped that the relative neatness and the ease of legibility of its pages will encourage such study in the future.

(ii) The Sentence Book of the Official Principal of St Andrews, 1541 to 1553 (SRO, CH5/2/1).

This volume measures eleven and three-quarter inches by eight inches and consists of 285 folios. It commences with an elaborate preamble on 10 October 1541[2] and concludes with the last sentence dated 23 September 1553. It contains, as the name suggests, only the sentences passed by the official principal on actions raised at first instance in his court and on appeals received from the diocesan courts of the province of St Andrews.[3] This was one of the main sources for the matrimonial sentences selected and published by Cosmo Innes.[4] More recently an analysis of the contents of the

1. Cf. below, pp. 180-7.
2. Fo. 3r.
3. Cf. below, pp. 241-54.
4. St A. Offic., 81-114, 141-52. Innes printed a total of fifty-eight sentences from this volume.

[redacted] volume, using batches of a hundred sentences from the beginning and the end, was carried out by Professor Donaldson.[1]

The Sentence Book is, on the whole, neatly written in a small contracted hand although different hands are clearly discernible, especially in the later folios.[2] Sentences were generally recorded one to a page although these could be two or three to a page if the matter was brief and the hand small; altogether 576 sentences are recorded. Each entry begins with a formal preamble giving the name and qualifications of the judge; this is followed by the names of the parties to the action and, occasionally, by the matter of the action itself although this is more usually referred to simply as the 'causa'.[3] A further section of formula then follows, relating that the judge has given due attention to learned advice and to the evidence and witnesses that have been produced, and then the sentence is recorded. In few cases does the entry record more than the bare details of the sentence (for example, that A must pay B a certain sum of money); neither evidence or reasons are detailed and we are frequently left in ignorance even of the original cause of the action. Matrimonial disputes, as is shown in Innes's selection, are among the most explicit, stating the purpose of the action and the reasons for the judge's final decision.[4]

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1. Donaldson, 'Church Courts', pp.365-6.
2. E.g. fos. 249-50. An illustration of the Sentence Book may be found in St A. Offic. between pp.86 and 87.
3. The matter under dispute is most often specified in actions for tiends or in important executry cases (e.g. fo.69v).
4. Cf. below, pp. 134-40.

(iii) Fragment of the Sentence Book of the Official Principal, 1541 to 1544 (SRO, CH5/2/2).

The term 'fragment' here is perhaps misleading. This item is in no sense a fragmentary piece surviving from a larger volume, but is in fact a series of copy extracts selected from the pages of the principal's Sentence Book over a period of about three years. When Livingstone described it as a fragment dating from 1522 to 1544[1] he clearly did not realise that there were in fact two fragments relating to two different Sentence Books. The folios of both, however, remain numbered consecutively.[2] The precise significance of the fragment, which consists of six loose sheets folded in the middle to form twelve sides measuring about eight by twelve and a quarter inches, is not immediately obvious. It records some thirty-two sentences, all of which are to be found in the principal's Sentence Book; the first dates from 22 October 1541 and the last dates from between 28 May and 8 June 1544. The copies are word for word, with the exception of seven which are given only in abstract and in the vernacular.[3] There seems to be no pattern in the selection except that the choice covers almost every type of sentence to be found in the principal's Sentence Book - matrimony, teinds, executry, contract, the confirmation of executors and the annulment of tacks, appeals upheld and appeals rejected, appeals from suffragans and appeals to Rome. This suggests two possible explanations for the fragment: it might either have been written as a type

1. Livingstone, Guide, p.193.
2. Thus the folios of CH5/2.2 are numbered 7-12, and the folios of CH5/3/2 (the Lothian fragment) are numbered 1-6.
3. Fos. 10v-11r.

of exercise by an aspiring scribe or compiled as a simple formulary to give quick reference for clerks making entries in the Sentence Book in the future. Although neither theory satisfactorily explains the inclusion of the vernacular abstracts, the second suggestion is perhaps more likely.

(iv) The Sentence Book of the Official of Lothian, 1513 to 1551 (SRO, CH5/3/1).

The Lothian Sentence Book presents a quite different appearance from that of the principal's Book. It is a very much larger volume measuring about eleven by fifteen inches and containing 357 folios; it covers the period from August 1513 to some time after the last dated sentence, passed on 9 June 1551.[1] The majority of Innes's matrimonial sentences were drawn from the volume,[2] and an analysis similar to that carried out on the principal's Sentence Book was performed on 200 of the sentences by Professor Donaldson.[3] At some point in the Sentence Book's history the order of the folios has been disturbed and some may even have been lost. A pencilled note on the fly-leaf of the volume, which from the initials 'C.I.' we may assume to be Cosmo Innes, suggests that the proper sequence begins with the folios 16-34, continues with folios 1-14 (there being no folio 15) and then resumes at folio 35; the true order may be even more complicated. Later in the volume the order

1. Fo. 352r.
2. St A. Offic., pp.3-78, 117-40.
3. See above, pp.16-17.

has again been disturbed: comparison with Acta I, where the sentences that occur between 1546 and 1549 are all dated, shows that folios 336 to 339 inclusive should in fact be placed between folios 329 and 330.

The entries are for the most part neatly recorded although the quality deteriorates sharply in the final folios where there is also some damage. It seems likely that sentences were written up in the Sentence Book before the sentence had actually been passed. On one occasion an entry was subscribed 'this sentence was not passed on account of the agreement (concordia) between the parties before it was pronounced',[1] and on other occasions sentences which appear in the Sentence Book are not found in the daily record of the Act Book. As many as three or four sentences are frequently recorded on each page, and while they contain much the same mixture of record and formula as the entries in the principal's Sentence Book, they are usually briefer and less informative. For the purposes of this study the last eighty folios have been singled out for particular examination; these relate to the twelve years between 1539 and 1551, corresponding as nearly as possible to the period covered by the principal's Book. An examination of the sentences passed between 1520 and 1525 and at other periods reveals no significant differences in either form or content.

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1. Fo.337r.

(v) Fragment of the Sentence Book of the Official of Lothian, 1513 to 1522 (SRO, CH5/3/2).

This fragment, or copy extract, from the Lothian Sentence Book compares closely with the other fragment already considered and would presumably have served a similar function. It also consists of six loose, folded sheets and it records thirty-two sentences, all in full. Again, a wide range of material is incorporated and the selection includes sentences on defamation and mortuaries which are not found in the other fragment. The sentences recorded between the third entry on folio 1v and the fourth on folio 3r are not to be found in the Lothian Sentence Book while others are in a different order. Clearly some sentences have been lost from the Lothian Book, and altogether the fragment records thirteen sentences which would not otherwise have been preserved.

(vi) The Act Book of the Official of Lothian, 1546 to 1549, (SRO, CH5/2/3).[1]

Acta I appears very much as the Dunblane Acta must have looked before being bound in two volumes: it measures sixteen by five and a half inches and consists of 517 folios covering the period between 11 October 1546 and 21 February 1548/9. The writing is less neat than that of the Dunblane Acta, more closely compressed and with less space between entries; there are a number of variations of

1. As the reference number indicates, this Act Book is incorrectly catalogued in Register House as an Act Book of the official principal.

hands although it remains constant for much of the first half of the volume. As in the Dunblane record the entries were made on a daily basis, preceded by a note of the date and the name of the judge or judges presiding. There are a greater number of 'in causa ...' entries (that is to say, entries recording a stage in a contested action) that in the Dunblane Acta, while a number of the other entries have been heavily scored out.

In many ways Acta I is the most interesting of the surviving church court records. Cosmo Innes chose six of the longer entries for inclusion in his volume of matrimonial sentences,[1] but it seems to have excited some interest at an even earlier date, and Sir Walter Scott referred to an incident described in one of its entries in his novel The Abbot, published in 1822.[2] It was listed by Livingstone only as 'Liber Actorum Officialis Sancti Andree', which may account for its mistaken attribution in the Register House catalogue. There is an element of uncertainty about its more recent history also. At some time prior to 1975 the volume was mislaid within Register House and listed as missing. When the work for this present thesis was commenced the Act Book was no more than a name in the catalogue and so it remained until August 1977 when it just as mysteriously reappeared. The rediscovery of Acta I brought with it some problems since it soon became apparent that in its

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1. St A. Offic., 153-60. Part of one of the folios of Acta I reproduced ibid. between pp.152 and 153.
2. See below, pp.282-3.

wealth of detail and the sheer extent of the material it was by far the most valuable of the St Andrews records. Whereas the Sentence Books may record four or five sentences a month the Act Book shows the official of Lothian's court at work five or six days a week, and dealing with anything between fifteen and fifty items of business a day. It shows cases in progress at every stage; it records items of business that would never have found their way into the Sentence Book; it shows the parties and their procurators, the judges, macers and clerks all active in their individual roles in the court. While this information was more than welcome, the ten or twelve thousand entries contained in Acta I presented a considerable challenge for this thesis. It was eventually decided that, while the whole volume would be examined, particular attention would be paid to the folios relating to the first judicial term covered by the book, a period extending from 11 October to 24 December 1546, and to the actions commenced during that time. While this may appear somewhat limited it may be noted that this period accounts for some 1100 entries, while the subsequent progress of actions then initiated accounts for 500 more. Close examination of other periods covered by Acta I show that although the number of entries decline somewhat[1] there is no great divergence from the patterns established in the first forty folios nor any reason why they should not be considered a representative sample.

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1. In the period of October-December 1547 there are only 467 entries; during October-December 1548 there are 703.

(vii) Act Book of the Official of Lothian, 1550 to 1553 (SRO, CH5/3/3).

'Acta II' is a considerably smaller volume than Acta I and consists of only 308 folios measuring seven and a half by eight and a half inches; the period covered extends from 6 May 1550 to 26 July 1553. Walton's comments on this volume in his list require some correction. Firstly, it is undoubtedly a record of the Lothian court; secondly, it was mentioned by Cosmo Innes although not by name. Comparing it to Acta I Innes wrote in the introduction to his volume of printed sentences:

> 'There is a similar volume as to its contents, still more carelessly written, and a great part of which is scored or cancelled, probably, in some cases, to mark that the matter had been extracted, and engrossed in the formal record of the court; whilst, in other cases, it appears that the decree so cancelled had been implemented, and its recording thereby rendered unnecessary.'[1]

As a description this is only partly satisfactory. Acta II is certainly carelessly written, often to the point of illegibility, while the scoring out has usually been done with a force more appropriate to a classroom than to a court; but although the record consists of daily entries like Acta I the contents are far from similar. There are no records of contested actions and thus no 'in causa ...' entries; the volume consists almost entirely of records of acts of monition but even these, as will be shown, differ

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1. St A. Offic., xii.

from those in Acta I.[1] The question of why two Act Books from the same court and from almost exactly the same date should differ so considerably is one that will be dealt with in more detail below.[2]

(viii) Act Book of the Commissary of Stirling, 1548 to 1552 (SRO, CH5/4/1).

The two remaining Act Books are very much slighter records. The Stirling commissary Acta has only forty-eight surviving folios, some of which are very badly damaged, and which measure seven and a half by eleven inches. The first recorded date is 6 March 1547/8 and the last 4 November 1552. The contents resemble most nearly those of Acta II, consisting mostly of acts of monition. The apparent overlap of this and the succeeding volume is explained by the existence of two separate ecclesiastical commissary courts operative in Stirling prior to the Reformation, as will be more fully explained below.[3] This Act Book will be referred to as the Stirling Acta.

(ix) Act Book of the Commissary of the Chapel Royal in Stirling, 1549 to 1550 (SRO, CH5/5/1).

This record is a fragment in the true sense of the word. The three surviving folios were found in the front board of the

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1. See below, p.184.
2. See below, pp.184-5.
3. See below, pp.74-75.

binding of the Stirling commissary Acta; they measure about eleven and three quarter by eight inches, and date from 21 January 1548/9 to 18 August 1550, although it is clearly not a complete record of that period. On such scant evidence it is difficult to come to any firm conclusions either about the record itself or about the court in which it was compiled. From what survives, which includes the constitution of procurators and a contested action, it would seem that the Act Book related more to the type of volume represented by the Dunblane Acta and the Lothian Acta I, as distinct from Acta II and the other Stirling Act Book. It will be referred to as the Chapel Royal Acta.

2. OTHER PRIMARY SOURCES - UNPRINTED

The extent of the surviving court records of the pre-Reformation church in Scotland is thus very small, especially in comparison to what is found in England. However, one result of the enormously wide range of church court interests is that material relating to the courts and their jurisdiction may be found scattered throughout the whole body of mediaeval Scottish records. To find such items is sometimes a matter of luck, although more often one of methodical searching; to list all their sources would be scarcely possible, as it would involve almost every major classification of mediaeval record. Instead, some areas of particular interest may be noted.

Although only a few church court books have survived intact from the hundreds that must have existed at some time or another prior to the Reformation, many scraps of fragments and copy-extracts of such books are to be found in a variety of places. A fragment of a register of the official of Lothian records two contracts that were made pending a sentence of divorce in 1521 and a process of excommunication of 1531 against two parties who had failed to pay the costs of an earlier action.[1] A copy extract records three stages in an action for the transference of a contract in August 1531, copied from the Lothian Act Book of the time and identical in form and language to similar entries in Acta I.[2] Another fragment, also of 1531, records the registration of a contract and a sentence of the official of Lothian,[3] and provides further evidence of the continuity of the styles and practices to be found in Acta I or other surviving court books. In addition there are many individual items such as citations, depositions, monitions, sentences and acts of all types surviving from the various ecclesiastical courts of Scotland which are of value not only in that they illustrate the activities of courts other than in the dioceses of St Andrews and Dunblane, but also because they fill in many gaps in procedure which are either not found at all in Acta I or are referred to only in passing.[4] Most of this material occurs

1. SRO, RH2/8/6, transcript of an original document in the possession of Lord Bolton.
2. SRO, Fraser Charters, GD86/96.
3. SRO, Morton Papers, GD150/1746.
4. Neither citations or libels, for example, were ever recorded in any detail in the Act Books.

in the many collections of family papers now kept at Register House under the general classification 'GD', but other useful sources are the collections of miscellaneous church documents (under CH7 and CH8), among the separate charter collections (under RH6 and RH2) and in the collections of burgh records (under B).

Apart from direct references to the courts and court procedure there are many examples of contracts and agreements which accepted the jurisdiction of one or other of the church courts as a sanction for fulfilment,[1] while burgh records contain details of the endowment of chaplaincies such as were often the subject of litigation before the officials.[2] Amongst other unprinted material notaries' protocol books and sheriff court records provide comparative information for the practice of the civil courts, as will the extensive records of the court of session when they are eventually subjected to detailed study.

3. OTHER PRIMARY SOURCES - PRINTED

(i) Ecclesiastical Material.

Modern students in the field of ecclesiastical jurisdiction have one considerable advantage over Cosmo Innes and his contemporaries - that in the last 130 years an infinitely greater amount

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1. Cf. below, 179-80.
2. Cf. below, p.278.

of source material has become available in print. Looking first at ecclesiastical records there are three published works that are of particular importance in this field.

The first is the work of Innes himself, the volume published by the Abbotsford Club in 1845 and containing all the sentences that Innes could find in the two Sentence Books relating to matrimony, together with a number of sentences illustrating other types of business and a few extracts from Acta I. Innes's book remains an indispensable introduction to both the history and the records of the officials' courts but as a source it suffers from a number of defects. In the first place the sentences are printed in an edited form. Although this abridgement removes much repetitive formula which makes tedious reading the omissions are made without any indication of what has been removed or where the cuts have been made. Not only were the lengthy formulas excised but individual words and phrases were snipped out of sentences in a way that often makes the printed text an unreliable and confusing guide to the manuscript. Secondly, the title of the book itself is misleading. Innes called it the 'Liber Officialis Sancti Andree... Sententiarum in Causis Consistorialibus que Extant' but he was in fact concerned almost exclusively with sentences on matters relating to matrimony and personal status. While 170 of the 210 printed sentences are devoted to this theme, the true proportion of such business amongst sentences as a whole amounts

to only fourteen per cent in the Principal Sentence Book and to no more than six per cent in the Lothian Sentence Book.

Some twenty years after the appearance of Innes's volume Joseph Robertson published the first comprehensive collection of church statutes relating exclusively to Scotland. This work, indispensable for all students of the mediaeval Scottish church, contains a lengthy preface of over two hundred pages dealing with the mediaeval church in general and the successive church councils in particular and is exhaustively annotated.[1] Its particular interest for our subject lies in those statutes which relate directly to the ecclesiastical courts, such as those passed in 1549 'for the reform of processes in the consistorial courts',[2] which include a detailed exemplar of the way certain summary procedures were to be conducted.[3] Many other statutes provide valuable background information on the administration of the church, whether on the early rules of discipline[4] or on the gathering of teinds and mortuaries.[5] The most obvious defect of Robertson's work is the lack of a suitable index, but this deficiency is in part made up by the work of David Patrick who, in 1907, produced an English translation of the statutes together with his own learned introduction and a detailed index.[6] Although there may sometimes be

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1. Concilia Scotiae: Ecclesiae Scoticanae Statuta (SES).
2. SES, ii, 124. Relevant statutes include nos.228-36, 284-5, 287.
3. Cf. below, pp.232-3.
4. E.g. SES, ii, 70.
5. E.g. ibid., ii, 44-47.
6. Patrick, Statutes.

occasion to quarrel with Patrick's interpretation of the original Latin,[1] his work remains a valuable and worthy addition to Robertson's Statuta.

The third, and perhaps most interesting, of the three major printed sources for Scottish church history is the St Andrews Formulare, published by the Stair Society in the early 1940s. Although it is to be regretted that the war-time conditions under which the volumes were produced prevented the inclusion of a modern index or a more detailed commentary, the Formulare remains one of the most potentially rewarding mediaeval sources in print. It contains 615 documents collected from the period 1514-1546 and was compiled as a style-book probably by a cleric named John Lauder who was archdeacon of Teviotdale and sometime clerk to the official principal of St Andrews.[2] As may be expected from a style-book the Formulare contains an enormously wide range of material, from the award of degrees to sentences of excommunication,[3] from the appointment of an official principal to the election of an archbishop,[4] reflecting the multifarious interests of the sixteenth-century church. Considerable use of the Formulare documents has been made in this thesis, but it is well understood that only a little of the potential harvest has so far been gathered.

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1. Cf. below, p.88. Patrick also unnecessarily confused the first part of statute no.236, which laid down rules for summary procedure, by rendering both actor and reus as 'party' when the intention of the Latin was clearly 'pursuer' and 'defender' (SES, ii, 124-5; Patrick, Statutes, 131-2).
2. St A. Form., i, p.vii. Cf. also below, pp.126-9.
3. St. A Form., ii, 309-15, 112-14.
4. Ibid., i, 31-32, 332-4.

In addition to these three major sources there are some important works of reference. Professor D.E.R. Watt's Fasti Ecclesiae Scoticanae Medii Aevi identifies almost 3000 of the secular clergy who held office in the pre-Reformation church, ranging from deans of Christianity to archbishops of St Andrews. This source is of particular importance both to tracing the development of early ecclesiastical jurisdictions and to the consideration of the roles the various diocesan commissaries.[1] A second work by Professor Watt provides detailed biographical material on Scottish graduates prior to 1410 and is an invaluable aid in following the careers of the earlier ecclesiastical judges.[2] Other printed sources which may be briefly noted include the St Andrews Rentale, which provides much useful incidental information from St Andrews in the 1530s and 1540s, and a comparable volume from the diocese of Dunkeld,[3] while the many cartularies and registers of the abbeys and dioceses of Scotland provide rich if inconsistent source material relative to the church courts and their jurisdiction.

(ii) Non-Ecclesiastical Material

Turning aside from sources which relate specifically to the church and church affairs, there is much material of a more

1. Cf. below, pp. 73-78
2. D.E.R. Watt, A Biographical Dictionary of Scottish Graduates to A.D. 1410 (Oxford, 1977).
3. Rentale Dunkeldense, ed. R.K. Hannay (SHS, 1913).

secular nature which has occasional relevance to our subject. In particular there are the sources which relate to practice and procedure in the civil courts of the period. One conclusion that emerges from a study of the church courts is that the division between ecclesiastical law and civil law was very much less obvious than might be expected, and nowhere is this more clearly demonstrated than in the career of Sir James Balfour of Pittendreich whose successive appointments included those of official of Lothian, chief commissary of the reformed commissariat, clerk register and lord president of the court of session. Between 1574 and 1583 Balfour compiled an exhaustive collection of legal precepts which are known as Balfour's Practicks. The Practicks are an essential guide to the practice of law in the mid-sixteenth century; many of the decisions he quotes date from the 1530s and 1540s while some sections relate quite specifically to the pre-Reformation church courts.[1] On occasion procurators in the church courts state points of law that could be taken almost verbatim from the pages of Balfour.[2] The close relationship between the courts of church and state means that all contemporary court records are potentially useful sources of information, both as regards that relationship and as regards our better understanding of sixteenth-century legal practices. Only one printed volume deals specifically with the records of the court of session following its establishment in 1532,[3] but other evidence

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1. E.g. BP, i, 23-30.
2. E.g. 'quia declaratio excommunicationis in quacumque parte litis recipienda' (Acta I, fo 65v, Sinclair v. Henrison); 'the exceptioun of excommunicatioun may be proponit at all times, befoir or efter litiscontestatioun' (BP, ii, 294).
3. Acta Sessionis (Stair).

of the practice of the state judicatures is readily available. The Acts of the Lords of Council in Civil Causes relates to the very end of the fifteenth century while a similar volume dealing with public affairs covers almost all of the sixteenth century prior to the Reformation;[1] the Register of the Privy Council also contains useful information for the latter half of the 1540s. As regards other courts the published records of the court of Admiralty contain striking evidence of the similarity of its procedure to that of the church courts,[2] while Croft Dickinson's edition of the Sheriff Court Book of Fife contains many useful observations on current legal practices together with many notes relating to the ecclesiastical jurisdiction.

Apart from legal records there are more general sources which frequently contain much material relating to the church and its courts. Outstanding here is the long series of volumes prepared by Sir William Fraser during the latter half of the nineteenth century and which made available in print much of the more important collections of documents then still in private hands. Although Fraser made a handsome living out of his scholarship, his work is not on that account to be disregarded, and indeed his volumes have provided some important church court evidence.[3] These family

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1. Acts of the Lords of Council in Public Affairs, 1501-54 [ADCP].
2. Acta Admirallatus.
3. E.g. the documents relating to the earl of Eglinton's divorce (Fraser, Eglinton, 163-81).

histories are also useful sources of information on the social and political background against which the church courts operated, material which may also be obtained from the works of contemporary historians. A volume like the Diurnal of Occurrents of the years 1513 to 1575[1] can cometimes be inaccurate or misleading, but it provides a colourful account of the years covered by the church court records and brings us a little closer to the eventful decades immediately preceding the Reformation.

1. A Diurnal of Remarkable Occurrents that have passed within the country of Scotland, since the death of King James the Fourth till the year 1575 (Bannatyne and Maitland Clubs, 1833).

THE DEVELOPMENT OF DELEGATED ECCLESIASTICAL JURISDICTION

THE DEVELOPMENT OF DELEGATED ECCLESIASTICAL JURISDICTION

In the Moral of his fable of the sheep and the dog Henryson identifies the judge - the 'fraudfull Wolff' - as 'ane Schiref stout'[1] and he continues with a fierce attack on the state jurisdictions. In the fable itself, however, the wolf is described as presiding over a church court and it is clear, as Lord Hailes commented, that the 'whole satire of the fable is aimed at the ecclesiastical judge'.[2] Whatever the reason for this change of focus it certainly made for dramatic convenience; if Henryson had instead sought in the Moral to identify the wolf with a particular ecclesiastical judge he would have been faced with a perplexing choice since during the middle ages jurisdiction in the church was exercised by the widest variety of people. Papal legates and papal delegates, bishops and archbishops, officials and commissaries, archdeacons and rural deans, indeed almost any cleric possessed of modest education might be called upon to exercise a judicial function. The purpose of this section will be to consider the development of delegation within the church's jurisdiction, and in particular to consider the way in which a certain slice of this jurisdiction

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1. See below, Appendix 1, 337, l.120.
2. Dalrymple, Ancient Scottish Poems, 282.

became the special concern of the officials and their courts. Many of the earlier developments in this process were foreshadowed, or at least paralleled, by developments in England and this aspect will be briefly discussed; we can then turn to the early development of delegation in Scotland before considering how the judicial hierarchy of the church had come to be organised by the sixteenth century. Three distinct themes predominate: the role of the bishop himself, the delegation of criminal jurisdiction and the delegation of instance jurisdiction.[1] Finally, we may say some words also on the exercise of jurisdiction by papal delegates.

1. DELEGATED JURISDICTION IN ENGLAND

The administration of justice in a diocese stemmed effectively from the bishop who possessed 'ordinary' jurisdiction by virtue of his office.[2] Despite extensive delegation, and despite the considerable demands made on the attention of bishops and archbishops by administrative duties and, very often, by the secular affairs of state, the judicial role of the ordinary remained an important function of the episcopate and even the busiest of bishops is found personally involved in the exercise of justice. It seems

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1. 'Instance jurisdiction' - that is, relating to actions brought at the instance of private parties. Also known as 'contested causes', this area of jurisdiction corresponds roughly to the modern idea of civil actions.
2. The 'ordinary' and the bishop were, for all practical purposes, synonomous in the diocese as a whole. Only when the metropolitan of the province appeared on visitations did the bishop's role as ordinary lapse (cf. A. Hamilton Thompson, The English Clergy [Oxford, 1947], 57 and n. 4. Cf. also, Corpus Juris Canonici, ed. A. Friedburg [Leipzig, 1879-81], ii, cols. 186-94).

that, in theory at least, there were always some categories of cases that were understood to pertain personally to the bishop. What such cases were in Scotland is nowhere specified but some indication of their extent may be found in English evidence. At Canterbury in the fourteenth century, for example, such matters included 'perjury in matrimonial causes or in the civil courts where bloodshed or dishersion were concerned, wilful murder, usury, sins against maidens and nuns, assaults on clerks in holy, or if serious damage were done, in minor orders, breaches of sanctuary, breaches of the episcopal parks and warrens, wilful hindrance of the bishop's officers in pursuit of their calling, conspiracies and other offences against the rights and liberties of the see'.[1] At Lincoln a similar practice seems to have been observed,[2] and since one sixth of the cases in the Lincoln audience court between 1514 and 1520 concern non-residence, it would seem that this too was reserved to the hearing of the bishop.[3] Although in practice most of these actions could be settled by subordinates, it was done only by express commission of the bishop.[4]

The chief obstacle to the personal exercise of jurisdiction by the bishops was their pre-occupation with other affairs, and while this became particularly obvious towards the end of the mediaeval

1. Thompson, English Clergy, pp.55-56.
2. An Episcopal Court Book for the Diocese of Lincoln 1514-1520, ed., M. Bowker (Lincoln Record Society, 1967), xiv.
3. Ibid., xii.
4. Thompson, English Clergy, p.51; R.M. Haines, The Administration of the Diocese of Worcester in the first half of the Fourteenth Century, (London, 1965), pp.338-40.

period,[1] the situation was such as to have long since demanded an effective and comprehensive system of delegation. This process had in fact begun as early as the fourth century in Europe when there emerged from the bishop's familiar circle an officer known as an 'archdeacon' who, in some areas at least, soon became the chief administrative officer of the diocese - the 'oculus episcopi'.[2] As diocesan administration expanded many dioceses were divided into a number of archdeaconries which came to be distinguished by fixed territorial titles, and with as many as nine in some of the larger continental dioceses.[3] A similar development took place in England where the relatively smaller dioceses were subdivided into two or three archdeaconries and where also, in the earlier middle ages, the archdeacon acted as the bishop's principal agent.[4] By the twelfth century the next stage of the development seems to have been under way, stimulated by a marked increase in the activity of the ecclesiastical courts and of the diocesan administration throughout Europe.[5] The office of bishop's official is found as early as the middle of the twelfth century at Norwich, and at many other dioceses by the end of the century,[6] coinciding with what appears to be the development of a

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1. Cf. ibid., pp.42-46.
2. A. Hamilton Thompson, 'Diocesan Organisation in the Middle Ages', Proceedings of the British Academy, xxix (1943), p.157.
3. Ibid., p.162.
4. C. Morris, 'The Commissary of the Bishop in the Diocese of Lincoln', Journal of Ecclesiastical History, x (1959), p.51.
5. Ibid., p.51.
6. C.R. Cheney, English Bishops' Chanceries (Manchester, 1950), p.20 and nn. 2, 3.

jurisdiction rivalling that of the bishop. Having for so long played so important a role in the diocese, especially in the exercise of judicial functions, the archdeacons appear to have themselves laid claim to 'ordinary' jurisdiction as pertaining to their office.[1] They began also to employ their own officials who appear in the diocese of Lincoln before the end of the twelfth century and almost everywhere else in England early in the next century.[2]

Despite the inherent dramatic possibilities we have been warned of 'exaggerating the importance of the war of bishops and archdeacons'.[3] Certainly any claim by an archdeacon to ordinary jurisdiction arose not out of any specific commission so much as from accustomed usage, and some rivalry was inevitable if only because in cases where instance jurisdiction was entrusted to an official, the bishop made no provision for the exercise of the criminal jurisdiction also pertaining to the ordinary. It has been suggested that, in some areas at least, the bishops took steps to provide for those aspects of jurisdiction which lay outside the competence of the official. In Lincoln, it seems, the office of sequestrator was expanded from its original function of sequestrating property or revenue due to the bishop into one of correcting and punishing the moral shortcomings of both clergy and laity - thus

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1. Morris, 'Commissary of Lincoln', pp.51-52.
2. Cheney, Chanceries, p.145 and n.6.
3. Morris, 'Commissary of Lincoln', p.52.

introducing the commissary who has been described as 'the bishop's vicar in each archdeaconry'.[1] The great area of the diocese of Lincoln made particular demands on its bishop and no doubt encouraged the autonomy of archidiaconal jurisdiction, but elsewhere this potential rivalry seems to have been settled by more or less amicable compromise.[2] As the claim of the bishops to the over-riding exercise of jurisdiction within their dioceses became increasingly secure the division between bishop's and archdeacon's justice in criminal matters tends to disappear; at Lincoln the offices of archdeacon's official and bishop's commissary had generally been combined by the end of the fifteenth century, and in many cases the distinction between the two can eventually have been of little importance.[3]

A distinction does remain however, between jurisdiction over criminal or correctional matters and that over instance business. It is impossible to make a general rule that will apply to every English diocese, but by the sixteenth century some general patterns had emerged. In one historian's estimation;

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1. Ibid., p.59. These episcopal commissaries/sequestrators are found also in the diocese of Norwich and Winchester (R. Houlbrooke, Church Courts and People during the English Reformation, 1520-70 [Oxford, 1979], p.32).
2. Cf. B.L. Woodcock, Mediaeval Ecclesiastical Courts in the Diocese of Canterbury (Oxford, 1952), pp.26-29; D. Owen, 'The Records of the Bishop's Official at Ely', The Study of Mediaeval Records (Oxford, 1971), p.189.
3. M. Bowker, 'Some Archdeacon's Court Books and the Commons' Supplication against the Ordinaries', ibid., p.284.

> 'It seems reasonably fair to say that in a medium-sized diocese a commissary, who is also sometimes called a corrector, exercised criminal jurisdiction, proved a few wills, and heard some contested causes, in "chapters" which were held at frequent intervals in various centres.'[1]

The majority of 'contested causes', or instance business, on the other had seem always to have been the particular concern of the official. The exact significance of the ruling of Boniface VIII that no official should hear matters of correction without a special mandate from the bishop is debatable;[2] certainly some such special mandates are found included in officials' commissions[3] and it may be that the papal ruling merely recognised an established custom, rather than created a new one.[4] In general, however, it would seem that these expanded commissions to officials were the exception rather than the rule.[5] It now remains to be seen how far these general patterns of development, (in the jurisdictions of the bishop and archdeacon, and in the division between criminal and instance jurisdiction) are to be found in Scotland.

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1. D. Owen, 'Ecclesiastical Jurisdiction in England, 1300-1500', Studies in Church History, xi (1975), p.201.
2. Corpus Juris Canonici, ii, col.978 (Sext., lib. i, tit. xiii, cap. ii).
3. E.g. in Lincoln (C. Morris, 'A Consistory Court in the Middle Ages', JEH, xiv [1963], pp.152-3), and in York (J.S. Purvis, 'The Ecclesiastical Courts of York', Archives, iii [1957-58], p.23).
4. Haines, Worcester, p.110.
5. Practice clearly varied from one diocese to another, but Houlbrooke suggests that much might depend on the size of the diocese; in larger dioceses such as London, Lincoln and York the consistory courts generally left correctional matters to the archdeaconry courts, whereas in certain smaller dioceses like Winchester and Chichester both types of action might be dealt with in the consistory (Houlbrooke, Church Courts and People, p.27).

2. THE DEVELOPMENT OF SCOTTISH DELEGATED JURISDICTION

Scotland was no exception to the rapid administrative advances that were made in the European church during the twelfth century; an organised chapter developed at Glasgow, and archdeacons are found at both Glasgow and St Andrews by the middle of the century.[1] Before the end of the century a bishop's official also is found in both these dioceses,[2] perhaps reflecting the increased security of Scottish bishops following the effective removal of the metropolitical pretensions of York by a papal bull of 1176,[3] and they are to be found in most other dioceses during the early decades of the next century.[4] Archdeacon's officials appear soon afterwards in the diocese of St Andrews (1245) and Glasgow (1275) although they are not found elsewhere.[5] Thus far development in Scotland conformed to the patterns established a little earlier in England, but we should be careful not to read into the existence of different offices the existence of rival purposes. The evidence, albeit scanty, of the judicial activities of the thirteenth-century church shows a remarkable lack of differentation between the roles of the different officers concerned. An example from 1246 shows a dispute between the abbeys of Arbroath and Coupar being finally composed at Forfar before the official of St Andrews,

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1. For the chapter of Glasgow cf. Watt, Fasti, p.151 ff. For the early archdeacons cf. ibid., pp.170-1, 304.
2. Ibid., pp.187, 323.
3. SES, i, pp.xxxv-xxxvi.
4. Watt, Fasti, pp.23, 38, 56, 92, 124, 140, 212, 244.
5. Ibid., pp.190-1, 327.

the official of the archdeacon of St Andrews and the dean of Christianity of Angus, and similar combinations are to be found elsewhere.[1] Another monastic dispute, between Dryburgh and the nuns of Berwick, was heard by the archdeacon of St Andrews, his official and the dean of Christianity of Lothian, and furthermore the cause was claimed to pertain to them 'not by any delegation but by ordinary jurisdiction.[2] The judges at Forfar in 1246 also claimed to be 'judges ordinary'.

The explanation of these claims perhaps lies not so much in there having been a division or even a fragmentation of the right to ordinary jurisdiction but rather in there having been no division at all. At the time of the Dryburgh dispute, probably in the early 1230s,[3] Laurence de Thorenton was both archdeacon and bishop's official for the diocese of St Andrews - or rather he had been official at the time he was appointed archdeacon in 1209, and 'his title of official seems to have been subsumed in the greater office; no replacement official was appointed so long as he lived'.[4] This suggests that there was no need for the bishop to appoint an official so long as he had an active archdeacon; whether de Thorenton exercised ordinary jurisdiction in the Dryburgh case qua archdeacon or qua official is not clear and is not important - in either case he was the representative of the bishop. A similar

1. Arbroath Liber, i, pp.321-2.
2. 'Coram nobis non ex delegatione sed orinaria jurisdictione ... quaestione verteretur' (Liber S. Marie de Dryburgh [Bannatyne Club, 1847], pp.77-78).
3. Watt, Dictionary, p.478.
4. Ibid., p.532.

example is to be found in the career of de Thorenton's predecessor, Ranulf de Wat, who was official of St Andrews before becoming archdeacon in about 1199. It has reasonably been suggested that de Wat's appointment as first recorded official of St Andrews was necessitated, at least in part, by the fact that the incumbent archdeacon, Hugh de Roxburgh, was at the time the royal chancellor and presumably non-resident.[1] Nor was the combination of the offices of archdeacon and official confined to the early, inchoate period of ecclesiastical jurisdiction: a century later we find William de Eaglesham holding office as official of St Andrews from 1310 to 1324, for the second half at least of which period he was also archdeacon of Lothian.[2]

There seems no reason to doubt that thirteenth-century archdeacons, when they were not otherwise engaged, enjoyed a wide and accepted jurisdiction. The settlement at Forfar in 1246 submitted the parties in respect of non-fulfilment of the terms to the jurisdiction of the archdeacon of St Andrews, just as the parties to a land charter of 1270 submitted themselves to the jurisdiction of the bishop of St Andrews or his offical.[3] William Frere, archdeacon of Lothian 1285-1306, is found as judge in a dispute involving

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1. Ibid., p.576. It may be noted also that there is no record of an archdeacon at Dunblane between 1255 and 1268 (Watt, Fasti, 88) and that the next recorded holder of the office was an English academic resident at Bologna who is not found in Scotland until 1283 (Watt, Dictionary, p.433); the first official of Dunblane is found in 1266 (Watt, Fasti, p.92).
2. Watt, Dictionary, pp.176-7.
3. W. Fraser, The Douglas Book (Edinburgh, 1885), iii, pp.4-5.

the abbey of Melrose sometime before 1291,[1] while acting on another occasion as commissary of the bishop.[2] Furthermore, it was during the thirteenth century that the archdeacon's own judicial deputy first appears in the two major dioceses. There is not a great deal of information on the activities of the archdeacons' officials: only five are known by name in the diocese of Glasgow, and only seven in St Andrews, and they are found only between the years 1245 and 1372.[3] We have already seen one at work assisting his archdeacon in his judicial duties,[4] and they were probably well qualified to do so; all five of the officials of archdeacons found in Glasgow were probably of graduate status,[5] while one went on to be bishop's official of St Andrews and another was promoted to the same office in Glasgow.[6] An official of the archdeacon of Lothian, Nicholas de Balmyle, became official of St Andrews during the vacancy of 1297-98 before rising to become the king's chancellor.[7]

The activities of these trained men suggest that there was in the thirteenth century a well-defined area of jurisdiction pertaining, in name at least, to the archdeacon; it suggests also that

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1. Liber Sancte Marie de Melros (Bannatyne Club, 1837), i, 316.
2. Watt, Dictionary, p.207.
3. See above, p.43, n.5.
4. See above, pp.43-44.
5. William Salsarius, William de Eckford, John de Musselburgh, Walter Cammoys, Hugh de Chirnside (Watt, Dictionary, pp.478, 170, 423, 78, 98).
6. John de Musselburgh, official of archdeacon of Teviotdale (1241x74, 1251x74), official of St Andrews (1273x4 - 1274x8); William de Eckford, official of archdeacon of Glasgow (1316), official of Glasgow (1328x30). Cf. n. 5.
7. Also known as Nicholas de St Andrews (Watt, Dictionary, pp.23-25).

in some cases the archdeacon was either not prepared or not able to exercise that jurisdiction himself. William Salsarius is first discovered as official of the archdeacon of Glasgow when holding an archidiaconal chapter in 1275,[1] and this may have been a foretaste of what became a significant development in the fourteenth century - the gradual estrangement of the archdeacon himself from the life of the archdeaconry or diocese.[2] It may have been that the essentially administrative nature of the archdeacon's office made it an attractive one for those concerned with making a career, and certainly there was the advantage of not having a cure of souls attached to the benefice; on the other hand it may have been that the qualifications of the archdeacons themselves made them ideal employees in the secular world. Whatever the reason the effect was clear: archdeacons had less and less time for their ecclesiastical duties. Some illustration of this may be found in the careers of the archdeacons of Lothian during the fourteenth century. Some holders of the office were scions of great families, such as William Comyn who was approaching seventy when appointed in 1329,[3] or his successor John de Douglas whose interests appear to have been more those of a soldier and father than of a priest;[4] others were more concerned with secular affairs, such as Walter Forrester whose 'career lay in the service of the kings of Scotland' and who combined the archdeaconry of Lothian with the office of wardrobe clerk to the

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1. Glasgow Registrum, i, p.191.
2. Cf. the situation in Worcester where 'the separation between the archdeacon and his office seems to have been completed by the beginning of the fourteenth century' (Haines, Worcester, 40). Here also absenteeism among archdeacons seems to have been an important factor in the appearance of archdeacons' officials (ibid., p.39).
3. Archdeacon of Lothian 1329-1336x7 (Watt, Dictionary, pp.109-11).
4. 1336x7 (ibid., p.153).

king,[1] or with academic pursuits, like James Borthwick who obtained three years' leave of absence from his archdeaconry in order to further his studies in France.[2] Archdeacons of Lothian were also much sought after for diplomatic assignments: Walter de Moffat acted as envoy to France in 1342, and to England in 1351 and 1354,[3] while his successor Walter de Wardlaw returned from an academic life in France to almost continuous employment as envoy to England, as well as to duties as the king's secretary, before being elected bishop of Glasgow in 1367.[4]

We should beware of making too much of the secular pre-occupations of the archdeacons at a time when the affairs of church and state were probably not strictly distinguished, but the persistent absenteeism that these pre-occupations often involved must have had a diminishing effect on the prerogatives of their office. Absentee archdeacons were not confined to the fourteenth century, as they had been employing their own officials a hundred years earlier,[5] but it was inevitable that continued involvement in outside affairs would diminish their administrative role within the diocesan hierarchy, and hence also their intermediate position between the bishop and his other subordinates. There is no evidence that the eclipse of

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1. 1386 (ibid., pp.197-200).
2. 1390-1408 (ibid., p.56).
3. 1340-1357x9 (ibid., pp.400-1).
4. 1356x9-1367 (ibid., pp.569-75).
5. E.g. Adam de Golin, archdeacon of Lothian 'probably' 1273-85, who studied in Paris during his period of office (ibid., pp.227-8).

the archdeacons as active judicial officers within the diocese was the result of deliberate episcopal policy; but the machinery of justice had to be provided, and if it was not to be organised by the archdeacon it would have to be organised by the bishop. The tribunal which sat at Forfar in 1246[1] comprised, in addition to the archdeacon's official, the official of the bishop and a dean of Christianity, and these last two officers were to play an increasingly important role in the administration of diocesan justice.

One of the statutes of the diocesan synod held by the bishop of St Andrews at Musselburgh in 1242 required that each church of the diocese should be visited annually by the archdeacons 'or by their deans' so that all defects might be brought to the bishop's attention,[2] and a thirteenth-century provincial council gave also to the archdeacons and deans the responsibility of inquiring into the private conduct of the clergy of each deanery.[3] These deans of Christianity, who correspond to the rural deans in the English church, appear in the twelfth century in St Andrews, Glasgow and a number of other dioceses, and are found in almost every diocese in the following centuries. The diocese of St Andrews appears to have been divided initially into six such deaneries in the twelfth century: Fife, Forthrif (or Kinghorn), Gowrie (or Perth), Angus, Lothian and Merse. The deanery of Lothian was divided by 1246 into two new deaneries, Linlithgow and Haddington, and the new deanery of Mearns

1. See above, pp.43-44.
2. 'Per archidiaconos nostros vel eorum decanos' (SES, ii, 54).
3. Ibid., ii, 15.

was added later in the same century.[1] Within each deanery the dean was clearly accorded by the statutes a supervisory role over the constituent parishes similar, and presumably subordinate, to that of the archdeacons. Their responsibility was one of inquiry and report, but there seems no doubt that deans of Christianity were considered competent enough to act as judges on special occasions. In the thirteenth century deans of both St Andrews and Glasgow regularly acted as judges delegate by papal commission, and were not apparently considered in any way inferior to their colleagues on such occasions.[2]

There is little evidence of the day-to-day functions of the deans, but at least some ruri-decanal chapters were held[3] and commissions to the deans of Merse and Haddington to collect procurations due to the bishop from their deaneries testify to their active presence there.[4] The system of deaneries thus provided an important administrative network within the diocese. In the thirteenth century the deans appear to have been immediately responsible to the archdeacon,[5] but references in the fourteenth century by the bishop to 'our official and our deans' do not necessarily mark a radical shift of allegiance.[6] English evidence warns us against looking for

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1. Watt, Fasti, pp.314-322. Cf. also, An Historical Atlas of Scotland, ed. P. McNeill and R. Nicholson (St Andrews, 1975), pp.150-1.
2. Cf. Select Scottish Cases of the Thirteenth Century, ed. Lord Cooper (Edinburgh, 1944), pp.9,13,28,33,35, for deans occuring as judges-delegate. The commission of 1231 to the dean of Fife, the prior and the archdeacon of St Andrews entitles any two of them to proceed in the absence of the third (ibid., p.35).
3. J. Dowden, The Mediaeval Church in Scotland (Edinburgh, 1910), p.218.
4. Ibid., p.214.
5. See above, p.49, n.2.
6. E.g. 'per officialem nostrum et decanos et eschaetarios nostros' (SES, ii, p.65).

a 'rigid demarcation' between bishop and archdeacon in the employment of deans[1] and it was the continental practice, at least, for the bishop to confirm the appointment of deans elected in the presence of the archdeacon.[2] An archdeacon who was active in the administration of the diocese would form a natural intermediary in the chain of command between bishop and dean; the phraseology of the statutes is perhaps only further evidence of the declining role of the archdeacon in that administration.

The same trend is to be found in the development of the office of bishop's official. It would seem that the authority enjoyed by later officials pertained at an early stage to the archdeacons. Certainly there seems to have been no great differentiation between bishops' officials and archdeacons' officials. The officials of the bishop of St Andrews had authority on both sides of the Forth;[3] yet the archdeacon of Lothian's official is sometimes referred to simply as official of Lothian,[4] and it is possible that he enjoyed a position relative to that of the bishop's official similar to that of later officials of Lothian to the officials principal. The bishops themselves do not seem to have been aware of any particular

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1. J. Scammell, 'The Rural Chapter in England from the Eleventh to the Fourteenth Centuries', EHR, lxxxvi (1971), 12.
2. Thompson, 'Diocesan Organisation', p.185.
3. E.g. Walter de Mortimer is found at chapters at Auchtermuchty and Haddington in the early 1240s (Watt, Dictionary, p.419), and William de Eaglesham delivered sentences at both Arbroath and Edinburgh during the course of his fourteenth-century officialate (Arbroath Liber, i, pp.308-9; Dunfermline Registrum, pp.233-5).
4. Watt, Fasti, p.327.

distinctions; as early as 1242 Bishop Bernham of St Andrews refers repeatedly to the bishop and 'his officials' and to 'our officials'.[1] This would seem to underline the fact that, within the diocese of St Andrews at least, there was just one jurisdiction exercised by the bishop and his subordinates, and not two rival systems. It is not clear whether at the end of the fourteenth century the appointment of archdeacons' officials broke down and so necessitated the creation of a new officialate of Lothian by the bishop, or whether the appearance of this new officer made the employment of an archdeacon's official in Lothian unnecessary; all we know is that the last archdeacon's official is found in Lothian in 1372 while the first bishop's official there appears just twenty years later.[2] Whatever the process, the end result was the same. The archdeacon gradually recedes as the bishop's principal deputy in the fields of administration and jurisdiction and his place is taken on the one hand by the deans of Christianity, with their administrative and supervisory responsibilities, and on the other by the officials as the chief judicial officers of the diocese.

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1. SES, ii, p.61.
2. Watt, Fasti, pp.327,325.

3. THE ORGANISATION OF CHURCH JURISDICTION IN THE 16TH CENTURY

(i) The Role of the Bishop

When we turn to look at the situation in Scotland at the end of the mediaeval period it would seem at first sight that much of the jurisdiction which in England was personally reserved to the bishop[1] had, in the diocese of St Andrews at least, already been delegated to the officials. A violent assault against a priest in 1543 was punished by the official principal with excommunication;[2] there also two clerics purged themselves of murder, and a Kirkcaldy chaplain was deprived for non-residence;[3] the official of Lothian heard the case of an armed assault made on the nuns of Haddington, and heard also of the insulting way in which an officer of the court had been treated in the course of his duty.[4] It was moreover to the court of the official principal at St Andrews that appeals could be made from any diocese in the province. The evidence shows, however, that so far from surrendering their personal interest in jurisdiction the archbishops of St Andrews played a significant part in the administration of justice.

The documents preserved in the St Andrews Formulare provide particularly detailed illustrations of the archbishops' involvement in judicial affairs. In 1518 the volume of business

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1. See above, p.38.
2. Sent. St A., fo. 49v.
3. Ibid., fos. 105v, 109v, 98v.
4. Acta I, fos. 7v, 161v.

demanding the attention of Archbishop Forman of St Andrews led him to appoint three vicars general to exercise his authority as archbishop, primate and *legatus natus*, and the terms of the commission show clearly the extent of the powers with which he himself was invested. Among other things the vicars general were empowered to hear all causes both civil and criminal, whether at first instance or by appeal; they were to correct excesses, to hear confessions and impose penances even in those cases reserved to the archbishop; they were to confirm major testaments, conduct visitations and convene chapters of clergy.[1] This was the theory of the ordinary's jurisdiction, although in practice much the greater part was exercised by permanent delegates. On many occasions, however, the archbishops chose to exercise their authority more directly, by *ad hoc* commissions to specially chosen delegates. Many of these commissions are preserved in the *Formulare*, and they illustrate the breadth of the archbishops' personal interests.

A particular concern seems to have been with moral offences and matters of clerical discipline. One commission of Archbishop Forman charged three commissaries to reform 'excesses' in the diocese and granted the right to impose penances 'even in those cases especially reserved to us by right', and to do whatever might be necessary in 'all cases in which the authority to dispense and absolve

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1. *St A. Form.*, i, pp.20-23.

is conceded to us either by right or by synodal or provincial constitutions'.[1] Other special commissions contain instructions to excommunicate disobedient monks,[2] to proceed against non-residents,[3] to visit and reform a nunnery,[4] to deprive a parish priest guilty of murder,[5] and to conduct proceedings against a priest accused of complicity in murder.[6] We do not find all the types of business which in English dioceses were reserved to the bishop, nor are those cases reserved to the archbishop 'by right' ever listed in detail, but some echoes of the list at Canterbury[7] are to be found. For example, a licence to a friar to preach and hear confessions specifically excluded the over-laying of infants, fraud in matters of teind and testament and wilful perjury.[8] Another document, constituting the sub-prior of St Andrews as general penitentiary for the diocese north of the Forth, named adultery, homicide, the over-laying of infants, breach of faith and incest amongst other matters of which the absolution was reserved 'to us by right as archbishop in the role of ordinary'.[9] A similar

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1. 'Etiam in casibus nobis a jure specialiter reservatis ... ac in omnibus casibus in quibus nobis a jure vel alias per constitutiones synodales seu provinciales permittitur et conceditur facultas dispensandi et absolvendi' (ibid., i, p.312).
2. Ibid., i, pp.3-4.
3. Ibid., i, pp.17-18.
4. Ibid., i, p.63.
5. Ibid., i, p.388.
6. Ibid., i, pp.177-8.
7. See above, p.38.
8. St A. Form., i, pp.327-8.
9. 'Quorum nobis ut archiepiscopo loci ordinario absolutio de jure reservatur' (ibid., i, p.29).

emphasis on perjury was made in Aberdeen where a statute of a thirteenth-century synod required all those confessing to perjury in matrimonial and other causes to be sent to the bishop alone for penance.[1]

Another important part of the ordinary's duties concerned the testamentary affairs of his diocese. The provincial council held in Perth in 1420 had affirmed that:

> 'From so long ago that there is no human memory to the contrary, bishops and those holding ordinary jurisdiction have been accustomed to confirm the testaments and codicils of those dying testate within their dioceses, to appoint executors to those dying intestate, and to have the goods of the deceased sequestrated until the testament has been presented to the ordinary and, if in order, has been confirmed.'[2]

Although in practice the greater part of routine testamentary business, including the confirmation of minor wills, was permanently delegated to subordinates within the diocese, the bishops retained their personal interest in the confirmation of all greater testaments - that is, those wills where the third part known as the 'dead's part' exceeded £40 Scots in value after the deduction of debts.[3]

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1. SES, ii, p.39.
2. 'Episcopi et ordinariam habentes jurisdictionem consueverunt a tam longo tempore de cuius contrario non est memoria hominum confirmare testamenta et codicillos decedentium subditorum suorum testantium et decedentibus ab intestato dare executores insuper sequestrari facere defunctorum bona quousque testamenta ipsorum forent ordinariis presentata et ab eiis si legitime essent confirmata' (ibid., ii, pp.77-78).
3. Anton, 'Mediaeval Scottish Executors', p.140.

Nevertheless jurisdiction by special commission, although outwith the system of permanent delegation, remained jurisdiction at second hand. In some matters, however, the bishop or archbishop was still prepared to appear in person. One of the earliest acts of David Betoun following the death of his uncle, the previous archbishop of St Andrews, was to have a large dais erected at Holyrood for the trial of heretics - a priority indicating the new archbishop's determination to further the struggle against heresy as vigorously as possible. Betoun and the bishop of Dunblane conducted the proceedings at Holyrood which sent four clerics and one layman to the stake;[1] it was Betoun who pronounced sentence against the heretic John Borthwick in 1540[2] and who presided over the trial of George Wishart six years later.[3] Archbishop Dunbar of Glasgow is found summoning suspected heretics to answer in Glasgow cathedral 'before us and our commissaries',[4] but he seems to have been less than zealous in his task and was reproved by Cardinal Betoun's commissaries for wishing to show mercy to two young men condemned to the stake.[5] However, while the punishment of heretics may have been the perquisite of a few, the task of discovering and accusing them was widely delegated. Most dioceses would have had commissaries or inquisitors such as the 'inquisitores heretice pravitatis' appointed by Cardinal Betoun[6] who would gather

1. Herkless and Hannay, Archbishops, v, 33-34.
2. St A. Form, ii, pp.225-7.
3. Herkless and Hannay, Archbisops, iv, 193-5.
4. St A. Form., ii, pp.59-60.
5. Herkless and Hannay, Archbishops, iv, 35.
6. St A. Form., ii, pp.105-7.

evidence of heresy. Such men would not always have been of the highest rank or qualification, though we should make due allowance for exaggeration when the reformer Alexander Seton complained that 'some of thame cane not read thair matynes who are maid judgeis in heresye'.[1]

Matters other than heresy were also referred to the personal consideration of the ordinary. He could take any dispute, either at first instance or on appeal, to his own hearing and he could preside in person in his own consistory court. From Dunblane there is evidence of at least one bishop who played an active role in the administration of justice. Bishop William Chisholm spent much of his long episcopate (1526-1564) involved in secular affairs and a historian of mediaeval Dunblane has concluded that:

> 'There is little in the records to show that, in spite of his bustling life as parliamentarian, friend of royalty and eager dealer in land, his main concern as bishop was, as it ought to have been, the care of his church and diocese.'[2]

The surviving Acta of the Dunblane commissary court appear to tell a different story. Sometimes only one item of business a day is noted as having been heard 'per reverendum',[3] but on other occasions the bishop clearly conducted the whole day's proceedings, either by himself[4] or with the assistance of a commissary.[5] The actions heard

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1. The Works of John Knox, ed. D. Laing, (Edinburgh, 1846), i, p.49.
2. J. Cockburn, The Mediaeval Bishops of Dunblane and their Church (Edinburgh, 1959), p.209.
3. E.g. Dunblane Acta, fo. 137r.
4. E.g. ibid., fo. 286v.
5. E.g. ibid., fo. 287r.

by the bishop covered a wide range of subjects but particular interests do stand out. Chisholm was always ready to consider the complaints of the Drummond family and heard actions brought by Lord Drummond, by Sibille Drummond and by John Drummond of Innerpeffray.[1] He heard a number of accusations of moral impropriety brought to court by his procurator fiscal,[2] and he took a particular interest in actions involving the welfare of his clergy; he even sat in court on Christmas Eve 1551 to hear a priest, John Foster, complain that he had ridden to administer the sacraments to an old woman only to be met on arrival by the woman's ungrateful son who had struck the horse and caused him to be thrown.[3] The villain's fate is not recorded.

It was also part of the ordinary's duty towards the discipline and welfare of his clergy that he should hold an annual diocesan synod or council which would be attended by the clergy of his diocese and at which, in addition to the transaction of purely diocesan business, he would publish the statutes passed by any provincial council.[4] Such synods seem to have been a regular

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1. Ibid., fos. 171v, 137r, 217v.
2. E.g. ibid., fo. 370r.
3. Ibid., fo. 119r. Dowden has noted that the usual ceremony with which the Eucharist was brought to the sick (as laid down in SES, ii, 34) could be ommitted if the person lived at too great a distance or if the weather was bad, and that the priest could then travel by horse (Dowden, Mediaeval Church, 245).
4. This was a requirement of the fourth Lateran council (SES, i, p. clxxxii and n. 1).

occurrence at Dunblane under Bishop Chisholm, being held on the Tuesday in the third week after Easter at least in the years 1551, 1552 and 1554, and quite probably in 1553 as well.[1] This period immediately following Easter seems also to have been the accustomed time for synods to have been held in the two archdeaconries of St Andrews,[2] and the synodal statutes of Archbishop Forman in particular show a keen interest in both the discipline of the clergy and in the moral life of the laity.

Much of the evidence of episcopal involvement in diocesan jurisdiction and supervision comes from the archdiocese of St Andrews whose archbishops, with their added responsibilities of primate, metropolitan and, often, of papal legate as well, were clearly not typical ordinaries. Nevertheless it is in St Andrews, precisely because of the greater responsibilities of the archbishop in the affairs of both church and state, that we would expect to find the greatest abdication of pastoral responsibilities, and it was not so. Although the bishops had inevitably to delegate many of their responsibilities their personal involvement should not be discounted, and there may have been many Bishop Chisholms in sixteenth-century Scotland who played a creditable part in the administration of ecclesiastical justice.

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1. The occasion of 'Synodus Dunblanensis' was noted by the clerk in the Act Book next to the date at the beginning of the day's proceedings (Dunblane Acta, fos. 45r, 168v, 361v). In 1553 the appointed day fell on 25 April when there was no regular court business.
2. SES, i, p. clxxxiii n.2.

(ii) Delegated Criminal Jurisdiction

By the sixteenth century responsibility for correctional and criminal matters within the diocese had largely passed out of the hands of the archdeacon, and we look in vain for an echo of that 'immense activity' found in some archdeacons' courts in England,[1] but he had not altogether abandoned his judicial involvements. The process by which the archdeacon was replaced by other diocesan officers in the judicial hierarchy was generally, as we have seen,[2] a peaceful one, but some disputes did occur and the terms on which they were settled help to define the situation for the last century before the Reformation.

One such dispute was between the bishop of Glasgow and the archdeacon of Teviotdale and was settled by decree of the dean and chapter in 1428. It was decided that the bishop had the right to his commissaries in the archdeaconry who:

> 'Were accustomed to sit, conduct proceedings, and judge and terminate all causes pertaining to ecclesiastical jurisdiction throughout the whole diocese, as in the greater archdeaconry.'[3]

that the archdeacon was entitled to his own commissaries within his archdeaconry who had competence in 'all minor causes', but that he could not institute a priest or deprive him of his benefice; and

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1. Bowker, 'Archdeacon's Court Books', 287.
2. See above, pp.48-52.
3. 'Qui consueverunt sedere procedere judicare et terminare omnes et singulas causas sicut in majori archidiaconatu Glasguensi ad ecclesiasticam jurisdictionem pertinentes sicut per totam diocesim' (ibid., p.320).

that there was the right of appeal from the archdeacon to the bishop or his court of audience. The minor causes which pertained to the archdeacon within his archdeaconry are not specified, but the assumption that these were confined to correctional matters finds support in the settlement of a similar issue between the bishop and the archdeacon of Brechin some twenty years later. Here the terms of the decision began with an affirmation that all causes, all correction and the confirmation of all testaments belong to the bishop, but that also the archdeacon might 'visit and inquire into the excesses of both clergy and laity and to gather due procurations from those places visited'.[1] These rights extended to the whole diocese (Brechin consisting of only one archdeaconry) with the exception of the cathedral church, but the archdeacon could deal with the greater excesses only within the bounds of his prebendal parish of Strachan. This last concession was successfully defended in 1544 when it was upheld by the official principal of St Andrews against the designs of the then bishop.[2]

The archdeacons therefore retained some control over correctional matters, but the burden of jurisdiction in this field

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1. 'Declaramus ... archidiaconum antedictum posse per totam diocesim excepta ecclesia cathedrali Brechinensi tam super excessibus clericorum quam laicorum inquirere et visitare ac locis per eum visitatis posse procurationes sibi debitas recipere' (Registrum Episcopatus Brechinensis [Bannatyne Club, 1865], i, 134).
2. Sent. St A., fo. 81r.

fell principally on the bishop, and in discharging it he relied heavily on two officers in particular: the dean of Christianity and the commissary of 'the greater excesses'. There survives in the St Andrews Formulare a document appointing a dean of Christianity for the deanery of Fife.[1] The dean's duties were to include the gathering of procurations, synodals and other dues owing to the archbishop, the conduct of visitations within the deanery and the holding of chapters to be attended by the clergy of the deanery; he was also to confirm minor testaments, to appoint executors where necessary, to render account of money gathered at annual diocesan synods, and to repledge all churchmen who had fallen into the hands of the civil authority. There is evidence that the deans were diligent at least in their financial duties: the accounts of the bishop of Dunkeld show the regular returns of procurations and synodals and of fees for the confirmation of lesser testaments that were made by the deans at annual synods.[2] At St Andrews also the deans rendered regular accounts of money collected,[3] although collection cannot have been easy and accounts were often in arrears.[4] Less evidence survives of their correctional activities, but the repeated exhortations of sixteenth-century councils makes it clear that the deans were considered by the bishops to be in

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1. St A. Form., i, 194-5.
2. Dunkeld Rentale, 8-24.
3. E.g. St A. Rent., 42-43.
4. Ibid., xxxv.

the front line of the fight against moral laxity.[1] This role is emphasised by occasional variations in their titles: an unnamed dean of Dunblane was described as 'decanus pravitatis pro excessibus' in the Dunblane Acta,[2] while Andrew Myll, dean of Christianity for Haddington in the mid-1540s, appeared in the court of the official of Lothian as 'decanus pravitatis' of Haddington.[3] References are also made to the sums exacted as fines for excesses, such as the three shillings and fourpence 'de oleo peccatorum' transmitted by the dean of Angus to the master of the bridge-work at Dunkeld.[4] This particular 'oil' may have flowed both ways: it was suggested at the provincial council of 1549 that some deans might have been accepting bribes in return for not revealing concubines and adulterers.[5]

In general the sixteenth-century deans of Christianity appear to have been men educated beyond the standards of the ordinary parish priest. Of the seven deans assembled or represented at the St Andrews synod of 1539 (Hugh Lindsay being dean of both Angus and Mearns) only two were not accorded the title of 'master'.[6] At

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1. E.g. SES, ii, 93-94. Cf. also, St A. Form., i, 15-17, for a mandate to a dean of Christianity to proceed against non-residents.
2. Dunblane Acta, fo. 42v.
3. Watt, Fasti, 321; Acta I, fo. 27v.
4. Vitae Dunkeldensis Ecclesie Episcoporum (Bannatyne Club, 1831), 130. This expression is explained ibid., 31: the bishop would not handle money raised by fines for moral offences - 'oleum autem peccatoris non impinguet caput meum'.
5. SES, ii, 93.
6. St A. Rent., 90.

Dunkeld only one of the eight deans mentioned by name in the Rentale appears only as 'dominus'.[1] It was at Dunkeld also that the single deanery was combined with the office of commissary general in the person of David Abercrombie in the late fifteenth century. In the words of Alexander Myln, Abercrombie was 'the first effective scourge of the excesses and crimes of the highland people';[2] he was succeeded by Walter Brown, 'highly skilled in the canon law',[3] who combined the posts of dean and official. The average dean of Christianity might not be so well qualified but zeal in the correction of excesses was clearly also an asset. When the diocese of Dunkeld was divided into four new deaneries in 1505 the area of Atholl was assigned to Sir Thomas Greig 'because of his knowledge of the local speech and his strictness in correction'.[4]

Deans of Christianity are found in almost every Scottish diocese. Dowden noted that there was no evidence for their existence in the sees of Ross, Brechin or Caithness,[5] but this has now been disproved in the case of Ross at least.[6] It may also be noted that the dispute in 1544 between the bishop and archdeacon of Brechin[7] arose from the bishop's attempt to hold an inquiry in the

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1. Dunkeld Rentale, 8-24.
2. 'Primus erat alpinatum et agrestis populi excesuum et scelerum dignus ultor' (Myln, Vitae, 60-61).
3. 'In jure canonice apprime eruditus' (ibid., 29, 64).
4. 'Propter patriae ydoma suamque corrigendo austeritatem' (ibid., 30).
5. Dowden, Mediaeval Church, 216.
6. Watt, Fasti, 287.
7. See above p.62.

archdeacon's own parish, summoning a number of parishioners to appear 'before the bishop or his dean of Christianity',[1] so no doubt the bishop employed an officer in this post for disciplinary duties even though the size of the diocese made the establishment of territorial deaneries unnecessary. Nevertheless, despite their ubiquity the competence of the deans of Christianity was strictly limited. Archbishop Forman's commission of appointment to the dean of Fife specifically reserved 'to our greater commissaries the correction of those discovered in greater excesses each year within the deanery'.[2]

The 'greater commissaries', or the commissaries of the greater excesses, were the bishop's chief officers in matter of correction. This is demonstrated by the terms of the appointment of three such commissaries, also by Archbishop Forman, preserved in the Formulare:[3] they were to cite, admonish and accuse all those discovered in the greater excesses by the deans on their visitations, or those who were accused by public notoriety; they were to exact fines and to impose penance even in matters reserved to the bishop. The precise nature of the intriguing 'greater excesses' is not detailed, but one reason why their correction should not be entrusted to the deans has already suggested itself. The council of 1549

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1. 'Ad comparendum coram dicto reverendo patre aut ipsius decano Christianitatis' (Sent. St A., fo. 81r). There is also mention of a dean in the diocese as early as 1248 (Brechin Registrum, ii, 265).
2. 'Salva tamen et reservata commissariis nostris majoribus correctione in majoribus excessibus in dicto decanatu annuatim compertorum' (St A. Form., i, 195).
3. Ibid., i, 311-12.

that worried about the possibility of deans accepting bribes[1] sternly insisted that the correction of all major excesses should be remitted to the commissaries without exception, and that the commissaries should look into the deans' obedience in this.[2] The church was clearly worried that the graver the moral offence the more vulnerable would be the local dean to pressure, and the more anxious the miscreants would be to buy themselves off. The fines raised by the St Andrews commissaries were to be put towards the fabric of the cathedral and to other pious uses,[3] much as the fines at Dunkeld were put into bridge-building, but at whose discretion this was done is not clear. Cardinal Betoun's chamberlain recorded the receipt of £17-2-7d. from the clerk of the commissaries of the greater excesses,[4] which sum represented the fines for excesses from the synod of 1543, but there is no indication of the final destination of the money.

Through the commissaries of the greater excesses and the deans of Christianity the bishop provided the principal machinery for the correction of abuses within his diocese, but they were not the only officers concerned with criminal jurisdiction. The existence of the 'inquisitores heretice pravitatis' has already been noted,[5]

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1. See above, p.64.
2. SES, ii, 93-94.
3. St A. Form., i, 312.
4. St A. Rent., 175.
5. See above pp.57-58.

and these officers seem to have been a permanent feature of the sixteenth century diocese. The office is found as early as the beginning of the fifteenth century when Laurence of Lindores, the first rector of St Andrews University, presided as inquisitor over the trial of the English heretic James Resby.[1] Laurence appears in 1432 as the inquisitor 'for the whole kingdom of Scotland'[2], but already there would have been subordinate inquisitors at work. Joseph Robertson suggested that the parliament of 1425 enacted that 'every bishop should cause his "Inquisitores Haereticae Pravitatis" to make search for heretics and lollards'.[3] In 1549 the provincial council held at Edinburgh laid down strict rules on the appointment of inquisitors by each ordinary, and on the standard of men needed for the post, and at the same time a list of questions or articles was prepared on which suspected heretics might be examined.[4] The commission to the three inquisitors appointed by Cardinal Betoun[5] covered both the diocese and the province of St Andrews, but it is not clear what provision would be made in other dioceses. In Glasgow, however, persons suspected of heresy were summoned to answer before the archbishop 'and our commissaries and inquisitors of heretical pravity'.[6]

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1. Cf. Watt, Dictionary, p.345.
2. St A. Acta, p.33.
3. SES, i, lxxviii-lxxix. The words of the original act are not, however, quite so precise: 'ilk Bischop sall ger inquyr be the inquisicione of heresy' (APS, ii, 7).
4. SES, ii, 117-120. This type of list of questions is closely related to the 'interrogatories' on which witnesses were examined in the officials' courts (cf. below, 216).
5. See above p.57.
6. 'Ad respondendum nobis et commissariis nostris et heretice pravitatis inquisitoribus' (St A. Form., ii, 59).

(iii) Delegated Instance Jurisdiction

As the system of commissaries and deans of Christianity had thus developed to deal with the bishop's correctional jurisdiction, so similar developments had taken place in the field of instance business. We have seen how the bishops began to employ officials in the late twelfth and early thirteenth centuries, possibly in response to the diminishing ability of the archdeacon to meet the judicial needs of the diocese. These officials early established their interest in such fields as the judicial regulation of contracts[1] and the hearing of disputes between parties,[2] and although there are no records of regular court business it would seem that they followed their English colleagues in confining themselves to the field of contested jurisdiction. By the sixteenth century the machinery of the officials' courts had been considerably expanded. Many dioceses had followed the example of St Andrews in employing a second official - an officialis foraneus[3] - to preside with a more limited authority at a different diocesan centre;[4] there were in addition a great number of other judicial officers who were all, with a number of variations, termed 'commissaries' and who were distinct both from the commissaries of the greater excesses and from the special commissaries of the bishop. On closer examination, however, this confused picture shows a greater degree of organisation than is at first apparent.

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1. E.g. the grant of land made under the jurisdiction of the official of St Andrews in 1363 (SRO, RH1/6/36, photocopy of MS in the possession of the Countess of Errol).
2. E.g. the teinds dispute heard by the official of St Andrews in 1319 (Cambuskenneth Registrum, pp.286-8).
3. Apparently from 'officiales astriciti cuidam foro diocoesios tantum' (J.T. Law, Forms of Ecclesiastical Law [London, 1831], 16 n.2).
4. In addition to St Andrews the dioceses of Glasgow, Argyll, Galloway, Orkney and the Isles all came to employ an official foraneus at some time (cf. Watt, Fasti, 189-90, 38,141,264,212).

Both Archbishop Forman and Cardinal Betoun appointed their officials principal by an identical form of commission[1] whose terms help us to define the limits of the sixteenth-century official's authority. The commission gave the right to hear all causes both principal and secondary, as well as appeals from the official of Lothian and from other diocesan judges; it granted the power of inquiry and correction, and the official could appoint commissaries to assist him. The right of hearing appeals in the province of St Andrews was peculiar to the official principal, but even allowing for that this is clearly a very comprehensive commission. That there were some restrictions, however, becomes apparent when we compare the official's commission to two others that also involve jurisdiction. Shortly after the appointment of John Weddell as official principal the pressure of business led Archbishop Forman to extend his commission and appoint him commissary as well. This chiefly involved Weddell in exercising Forman's authority not just as archbishop and metropolitan but as primate and legatus natus also; more specifically, Weddell acquired the additional authority to hear actions concerning benefices, 'even those leading to deprivation'.[2] Turning to the commission to Forman's three vicars general we find that they too have this power, together with the right to conduct visitations and to institute priests to benefices.[3]

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1. St A. Form., i, 31-32; cf. also ibid., ii, 197.
2. Ibid., i, 32-33.
3. Ibid., i, 20-23.

According to the traditional formula, expressed in the nineteenth century by J.T. Law;

> 'The power of vicars general differs from that of principal officials, since officials are said to be those persons to whom the cognizance of causes is generally committed by such as have ecclesiastical jurisdiction; and on such persons the cognizance of causes is transferred throughout the whole diocese, but not the power of inquisition, nor the correction of crimes, nor can they remove persons from their benefices, nor collate to benefices, without a special commission.'[1]

This is the situation that English evidence has led us to expect[2] but, with the exception of causes concerning benefices, it does not seem to apply to the St Andrews officials. Weddell's commission clearly includes the right to hear 'criminal causes' as well as granting the power of 'inquiry' and of 'correction and reform', while we have already seen that the officials were dealing with apparently criminal business in their courts.[3] Furthermore, there is evidence that officials did carry out visitations: in 1428 parliament required that inquiry for cases of leprosy should be included in the parochial visitations of bishops, officials and deans,[4] and a century later the charter of the collegiate church of Crail provided for twice-yearly visitations by the official principal 'for the purpose of censuring and punishing abuses therein and to superintend the state of the ornaments'.[5]

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1. Law, Ecclesiastical Law, p.16.
2. See above, pp.41-42.
3. See above p.53.
4. APS, ii, p.76.
5. SRO, Burgh Records of Crail, B10/104. Cf. also, St A. Form., ii, 118-19, where the official of Lothian, among others, is directed to visit the collegiate church at Corstorphine.

The key to this apparent contradiction must lie in the absence from the official principal's commission of the general authority to conduct visitations. On closer examination it can be seen that the apparently criminal cases occurring before the St Andrews officials were all brought at the instance of another party: for example, the man who attacked a priest was brought to court not by the initiative of the official but as the result of an action brought by the victim himself.[1] The apparent grant of the power of ex officio inquiry in the official's commission is puzzling. It may be that such a power was a traditional prerogative of the officials principal of St Andrews, albeit one that was not used, or it may have been that the compiler of the Formulare followed too closely the formulae of the commission to the vicars general which is very similar; but it is certain that no such inquiries are recorded in the court books. In the case of visitations it is not to be wondered at that men of the qualifications of the officials should be in demand for the supervision of religious houses, but such supervision would have been carried out by express invitation or commission, and would not have been part of the duties of the official's office. It is clear from the records that the chief concern of the officials of St Andrews at least was with the field of contentious jurisdiction and they may be imagined as forming a chain of delegation that was parallel to that by which correctional jurisdiction was exercised through the agency of the deans and the commissaries of the greater excesses.

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1. Sent. St A., fo. 49v.

Instance jurisdiction was not, however, confined simply to a body of men known as 'officials'. Such a picture takes no account of the role played by commissaries, and this complication must now be considered. It will be clear by now that the term 'commissary' is not one that is capable of simple definition; it seems, indeed, to have been applied without distinction to almost every category of judicial deputy. There was, however, a considerable degree of method in the system and it is one that will be more readily understood if we distinguish three general categories of commissary in addition to the two (the ad hoc commissaries and the commissaries of the greater excesses) that have already been discussed; the three are territorial commissaries, commissaries general and officials' commissaries.

The late fifteenth century and the sixteenth century saw the appearance of a number of commissaries who were apparently possessed of a jurisdiction based on fixed localities which did not coincide with established officialates. These were, with their first recorded date, Tullilum (1513) and South of Forth (1505x11) in the diocese of Dunkeld; Kircudbright (1467) and Wigtown (1501) in the diocese of Galloway; Hamilton (1514), Kilbride (1513), Campsie (1506), Monkland and Cadder (1555), Manor (1511), Cardross (1512), Douglas (1516), Stobo (1504) and Lesmahagow (1513) in the diocese of Glasgow; Inverness (1522) in the diocese of Moray; and Stirling (1545x8), the Chapel Royal of Stirling (1530) and Currie (1543) in

the diocese of St Andrews.[1] These commissariats seem to be of two types. The first consists of the commissaries of peculiar jurisdictions which pertained either to an institution like Kelso abbey (in the case of Lesmahagow) or to a cathedral prebend, as was the case with the remaining commissariats in the diocese of Glasgow and in the case of Currie.[2] The second type consists of those commissaries who represented the bishop at those important diocesan centres which did not coincide with the seat of the official's court - in much the same way as an officialis foraneus was established at Edinburgh. Thus the bishop of Dunkeld had commissaries at Perth (Tullilum) and in the part of his diocese south of the Forth; the Bishop of Moray had a commissary at Inverness, and the Bishop of Galloway commissaries at Kirkcudbright and Wigtown, while the Archbishop of St Andrews had a commissary at the important royal centre of Stirling. The commissary of the Chapel Royal is less easy to classify. The collegiate body of the Chapel was presided over by the Bishop of Galloway who was also Bishop of the Chapel Royal, and from 1511 it would appear that his authority extended not only over the Chapel Royal but over all the royal palaces in Scotland as well.[3] The commissary of the

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1. Watt, Fasti, passim. It is emphasised that this list excludes those commissariots for which there existed a geographically equivalent officialate (e.g. Nith and Annandale in the diocese of Glasgow and Bute and Arran in the Isles) and also those which first appeared after 1560 (e.g. Iona in 1573).
2. Thus Hamilton pertained to the dean of Glasgow, Kilbride to the precentor, Campsie to the chancellor, Monkland to the sub-dean, Manor to the archdeacon, and Cardross, Douglas and Stobo to canons, all of Glasgow, and Currie pertained to the archdeacon of St Andrews (Watt, Fasti, passim).
3. History of the Chapel Royal of Scotland, ed. C. Rogers (Grampian Club, 1882), xlii.

jurisdiction styled himself variously as 'commissary of the jurisdiction of the Chapel Royal' and as 'commissary of the bishop of Candida Casa and the Chapel Royal',[1] so it is not clear whether he was regarded as the commissary of a peculiar jurisdiction which included the royal palace or whether he was more of a commissary 'foraneus' of the bishop of Galloway. Certainly the business that appears to have been conducted in his court, and which includes items of instance business, compares to the types of business heard by the official of Lothian or by the commissary general of Dunblane.

There is only scanty evidence as to the competence of these commissaries. The records of the Stirling commissary (as distinct from the commissary of the Chapel Royal) consist almost entirely of acts of monition and of the registration of contracts, and as such is similar to Acta II of the Lothian court; it is not clear whether such business was the extent of this commissary's competence or whether, as in the Lothian court,[2] the details of contested causes would have been recorded in another book. In the case of the peculiar jurisdictions we might expect that the commissaries enjoyed a competence comparable to that of the archdeacon of Brechin in his own parish of Strachan;[3] the commissaries foranei, on the other hand, may have possessed a jurisdiction similar to, if more limited than the diocesan officials. Matrimonial causes were

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1. Chapel Royal Acta, fo. 3r.
2. See below, p.185.
3. See above, p.62.

certainly cognizable before the commissaries of Douglas, Lesmahagow and Kilbryde,[1] while the commissary of Hamilton claimed the right to correct the chaplains of the collegiate church of Hamilton.[2] The commissary of the jurisdiction of Currie (the prebend of the archdeacon of St Andrews) was clearly entitled to hear testamentary actions, although there appears to have been the right of appeal to the court of the official principal.[3]

The second category of commissary to be considered is that of commissary general. This is not an appointment that can be precisely defined, and it may well be a mistake to attempt to read into every occurence of the term the implication of an office distinct from that of mere commissary; the same officer at Dunblane, for example, is found described variously as 'commissary general' and 'commissary' within the space of a few pages of the court record.[4] However, the term does appear sometimes to have carried a particular significance. Archdeacon Comyn of St Andrews was appointed commissary general of the diocese during the vacancy of 1333 and in that capacity is found issuing a mandate for the institution of a

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1. Protocol Book of Gavin Ros, 1512-32 (SRS, 1908), 22-23, 25, 88-89.
2. Ibid., 10.
3. Sent. St A., fo. 57v. There do not appear to be any other examples of appeals against archidiaconal jurisdiction being heard in the officials' courts. In Glasgow diocese there was the right of appeal from the archdeacon to the bishop or his 'auditorium' in the fifteenth century (see above, 62 and n.1) and so it may have been in the court of audience, or before special commissaries, that such appeals were normally heard.
4. E.g. John Sinclair is designated 'commissary' on 7 Jan. 1551/2. 'commissary general' on 8 Jan. and 'commissary' on 14 Jan. (Dunblane Acta, fos. 121v, 122r, 123r).

priest;[1] it is not certain whether there was an official at this time but it would seem that Comyn's authority exceeded that of a regular official, and we are reminded of the additional powers granted to John Weddell when he became Archbishop Forman's commissary.[2] William Elphinstone appeared as commissary general in St Andrews in 1483 after five years as official of Lothian;[3] commissaries general are found at Aberdeen between 1527 and 1551, at a time when there is no record of an official;[4] a commissary general is recorded in 1557 in the diocese of Caithness where there does not appear to have been an official after 1446,[5] and at Brechin the office was established by 1507 and seems to have replaced the officialate after 1519.[6] At St Andrews two commissaries general occur during the vacancy in the principal officialate between January and September 1546, while other commissaries occur as 'commissary general of the official' at times when there is an active official.[7] We can only conclude that the office of commissary general carried an authority at least equal to that of an official and it could be employed either to assist the official, or to replace him during a temporary vacancy or, as at Brechin or Dunblane, to replace him entirely.

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1. Watt, Dictionary, p.111.
2. See above, p.70.
3. Watt, Fasti, p.328.
4. Ibid., pp.24-25. Alexander Vaus, official of Aberdeen, is found as commissary of the bishop during his absence in 1473. (Registrum Episcopatus Aberdonensis [Spalding and Maitland Clubs, 1845], i, pp.307-9).
5. Watt, Fasti, pp.73-74.
6. Ibid., p.57.
7. Ibid., pp.328-9.

Clearly distinct from this category, therefore, is the group of commissaries whom we may term 'officials' commissaries'. John Weddell's commission as official principal empowered him to appoint one or more commissaries with an authority equal to, or more limited than, his own,[1] and such commissaries played an important role as deputies to the officials. This group of commissaries will be considered in greater detail when we come to consider the judges in the officials' courts,[2] but we should note at this point that their functions and duties were essentially those of the officials to whom they acted as deputies and whom they often succeeded. They are found engaged in the full range of the business of the officials' courts, from the routine registration of transactions to the pronouncing of sentences,[3] and there is little doubt that without the aid of commissaries the great volume of business which demanded the attention of the officials could not have been adequately dealt with. The situation at Dunblane where the titles of commissary and commissary general seem often to have been inter-changeable is perhaps explained by the permanent absence of an official and by the personal involvement of the bishop. It may well have been that Bishop Chisholm preferred to run the court with the assistance of a group of commissaries of whom one, at any one time, might hold the senior authority of commissary general in the bishop's absence.

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1. St A. Form., i, 32.
2. See below, 107-8.
3. E.g. the first four weeks of business recorded in Acta I were conducted by commissaries (Acta I, fos. 1r-11r).

In addition to these three categories of commissary we should note the activities of a number of other people who are found involved in the broad sphere of instance jurisdiction. Public notaries could be appointed as special commissaries of the official with the authority to register contracts, collect testimonies and perform other administrative duties at a fixed locality.[1] On other occasions an individual might be commissioned by an official to carry out a specific task, while commissaries themselves could employ commissaries depute to perform some of the duties of their office.[2] There is little doubt that delegation was as rife at the bottom of the judicial hierarchy as it was at the top.

4. PAPAL JUDGES DELEGATE

The chief spur to the delegation of a judicial function was the necessity of finding someone available to do the job. Even the most dedicated judges were obliged to rely on deputies at some time, and nowhere was this more true than in the field of papal jurisdiction. It was possible to apply to Rome for the appointment of local judges delegate to give some particular cause a first hearing and such judges were active throughout the century preceding the Reformation. The history of papal delegation in Scotland is a subject in itself and outwith the scope of this thesis, although the question of appeals to Rome will be considered later. We cannot,

1. E.g. Prot. Bk. Ros., 75,76,80 and many other references.
2. E.g. the obligation drawn up before a commissary depute of Glasgow in 1506 (SRO, Duntreath Muniments, GD97/2/46).

however, conclude this discussion of judicial organisation without taking a brief look at the system which often operated alongside that of the officials.

Delegation from Rome was early established as a means of coping with the increasing quantity of first instance business that flowed to Rome from the twelfth century onwards. At first bishops and then abbots and archdeacons were commissioned to hear causes that had been brought to the pope,[1] and it was not long before it became the practice for these judges delegate to excuse themselves from acting personally and to appoint sub-delegates in their place, thus saving a further reference to Rome for the appointment of new delegates.[2] The office of judge in such actions could therefore be exercised by a wide variety of clerics: we have already seen that deans of Christianity were employed as papal judges from an early period,[3] and in the sixteenth century we find examples of officials themselves acting as delegates,[4] in addition to the provosts of collegiate churches,[5] archdeacons and canons.[6]

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1. J. Sayers, Papal Judges Delegate in the Province of Canterbury 1198-1254 (Oxford, 1971), pp.9-10.
2. Ibid., pp.135-43.
3. See above, 50.
4. E.g. the official of Glasgow (St A. Form., ii, 16-18).
5. E.g. John Williams, provost of Seton, on 7 July 1537 (SRO, Fraser Charters, GD86/116).
6. E.g. subdelegation by the archbishop of Glasgow and the bishop of Dunkeld, judges delegate, to two canons of Dunkeld and two of Dunblane (St A. Form., ii, 101-3).

The existence of this secondary judicial system within the diocese may have been something of a handicap to the officials. The operation of the two systems was at times so closely intermingled that the distinction between the two must often have been obscure to a layman: for example, the provost of Seton, as judge delegate, presided in court in St Giles, Edinburgh, in 1537 to confirm the sentences of commissaries of Glasgow.[1] It may be that the delays and inconveniences of Roman litigation thus became associated by the laity with ecclesiastical courts in general; and the officials' courts already had the problem of delayed appeals to Rome to contend with. However, and more important, there was a positive side to this connection. It meant that the Scottish officials and lawyers were in regular contact with a common legal system that was practised throughout most of western Europe. This contact led to a remarkable degree of uniformity in practice: the rules of procedure in the courts of twelfth-century English judges delegate closely follow those used in the officials' courts of sixteenth-century Scotland.[2] Although it is necessary here to separate the evidence of papal jurisdiction from the regular judicial business of the diocese, it is in many ways an artificial distinction and one which a sixteenth-century official, with his reverence for the canon law and for the papacy as the fount of justice, would have in all probability neither recognised nor appreciated.

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1. SRO, Fraser Charters, GD86/116.
2. Cf. Sayers, Judges Delegate, 42-49; an example is the ten days allowed for appeal (ibid., 96) which is echoed by a decision in the court of the official principal in 1545 that an appeal was invalid since it had not been made within ten days of the definitive sentence (Sent. St A., fo. 117v). Cf. below, 247.

THE COURT OF THE BISHOP'S OFFICIAL

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The judicial interests of the church were clearly both extensive and complex and in one form or another could involve almost any rank of churchman or reach into any parish in the land. Within this framework our attention must now be focused on that particular area of jurisdiction exercised by the official and commissaries of the bishop and this section, the first of three to examine in detail the means by which that jurisdiction was exercised, will consider the official's court as a working tribunal - how, when and where it was held, and the people who were involved in it.

1. THE DEVELOPMENT OF THE CONSISTORY COURT

The sixteenth-century official's court was the product of evolution rather than institution so that terms such as 'court', 'consistory' or 'consistorial court' can be used only with the strictest regard to the particular period and circumstances under discussion. The court that is revealed by the Lothian Act Books, with its highly technical procedure, regular sessions and records and its skilled corps of advocates, had no counterpart in the thirteenth century; instead we must look to an older tradition of jurisdiction which has its roots in the very earliest centuries of the church's history - the collective exercise of justice.

As early as the third century the western church accorded a judicial function not only to bishops but also to priests and deacons when acting collectively,[1] and in later centuries the exercise of jurisdiction by the bishop in association with his cathedral chapter, or by the bishop with an assembled synod, has been well demonstrated in continental sources.[2] Edouard Fournier has drawn attention to the correspondence of the idea implicit in both 'chapter' and 'synod' (that is to say, of the bishop sitting in judgement with his clergy) with the description of the bishop's court as a 'curia', a word which from classical times had been associated with the collective exercise of justice and which, in the eleventh century, referred particularly to the feudal court in which the seigneur might deliberate with his vassals.[3] Whether or not the great feudal interests of the church led to an adoption of feudal practices, as Fournier goes on to suggest,[4] is not immediately important; what is significant is that prior to the appearance of the bishop's official in the late twelfth century[5] (and it was with the administration of justice in the period before the advent of the officials that Fournier was particularly concerned) there was a strong tradition of collective judicial deliberation within the church - a tradition in which lay the origins of the later consistory court.

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1. DDC, iv, col. 533.
2. E. Fournier, L'Origine du Vicaire Général et des Autres Membres de la Curie Diocésaine (Paris, 1940), 91,95.
3. Ibid., 95-97.
4. Ibid., 98.
5. See above, 39-40.

The involvement of Scottish cathedral chapters in judicial duties is illustrated by a judgement given in 1245 by the bishop of Dunkeld in a dispute involving the church of Dull, a judgement given 'in consultation with our venerable brother Clement, bishop of Dunblane, and with the canons of our cathedral church of Dunkeld'.[1] More usually, however, it was the decanal chapters that were involved and it is here that we first find the officials at work.[2] When Laurence de Thorenton, archdeacon and official of St Andrews, together with his colleagues pronounced sentence at the chapter of Lothian in the early 1230s 'by ordinary jurisdiction',[3] they did so only after hearing the advice of the 'prudent men of the chapter of Lothian!.[4] Just how much attention was paid to this advice is not clear but a suggestion that it was more than a mere formality comes from the chapter held at Auchtermuchty in 1240 where a dispute between Dunfermline Abbey and the vicar of Inverkeithing was decided by documentary evidence produced by the monks:

> 'Having carefully examined the document the chapter there decreed the said monks to be free and immune from payment of the said sum.'[5]

The names of the official and of the archdeacon of St Andrews and of the dean of Fife were then appended not as judges but as witnesses

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1. 'Consilio cum venerabili fratre nostro Clemente deo gratia episcopo Dunblanensis et cum canonicis nostris cathedrali ecclesie Dunkeldensis' (St A. Lib., 307-8).
2. See above 63.
3. See above 44.
4. 'Nos vero post disputationes et rationes partium intellectas communicato prudentium virorum capituli Laudonie consilio diffinitive pronunciavimus ...' (Dryburgh Liber, p.78).
5. 'Quo articulo diligenter inspecto decrevit ibidem capitulum dictos monachos a solucione dicte pecunie liberos fore et immunes' (Dunfermline Registrum, p.137).

to the chapter's decision. Another dispute, between the abbeys of Arbroath and Dunfermline, was 'fully aired' in the chapter of Angus in 1246 before being settled by an amicable composition before the official at Forfar.[1] On the other hand, at a chapter held at Haddington in 1242/3 the official and the dean of Lothian seem clearly to have been regarded as judges when the evidence was produced 'coram nobis in pleno capitulo'.[2] Although no clear conclusion can be reached on this point the judicial role of the chapter, whether formal or real, seems undeniable; it is perhaps reasonable, in the light of later developments, to suggest that the collective nature of these deliberations was gradually being eroded by the increasing activity of skilled and professional judges.

As judicial tribunals these chapters had obvious disadvantages. At the beginning of the thirteenth century the diocese of St Andrews was divided into six deaneries, four of which lay to the north of the Forth and two to the south, and this number was increased during the course of the century by the division into two of the old deanery of Lothian and by the creation of the new deanery of Mearns.[3] The first sign of the division of the deanery of Lothian are to be found in 1245 when the official of St Andrews heard a dispute in the chapter of East Lothian, held in the parish church of Lauder, so the number of potential venues for judicial proceedings

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1. Arbroath Liber, i, 321.
2. St A. Lib., 390. 'Coram' is the customary word for indicating a judicial presence.
3. See above, 49-50.

had clearly been increased.[1] Not only were the locations of the chapter meetings scattered widely throughout the diocese but the meetings themselves would necessarily be infrequent and of short duration. Their purpose was as much administrative as judicial and they seem to have fulfilled at the level of the deanery much the same function as did the synod at diocesan level,[2] while the chapter at Auchtermuchty is recorded as being 'celebrated'[3] in the same way as the general synod of David de Bernham was 'celebrated' at Musselburgh in 1242.[4]

At some point during the thirteenth century the importance of the decanal chapters seems to have waned in the face of a larger and more comprehensive gathering known as a 'consistory'. It may have been the division of the old Lothian deanery (which no doubt accounted for a large part of the judicial and administrative business of the diocese) into two new units that prompted the assembly of clergy on an archidiaconal rather than a decanal basis, but certainly by the fourteenth century the institution of the consistory seems to have been established. An episcopal statute of the diocese of St Andrews, datable to that century, required all the

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1. St A. Lib., 329-31. For the division of the deanery see Watt, Fasti, 319-20.
2. See above, 49-50.
3. E.g. the chapter held at Auchtermuchty in 1240: 'apud Uchtermothekin partibus in capitulo ibidem celebrato per procuratores legittime constitutos comparentibus' (Dunfermline Registrum, 137).
4. 'Octo menses a die hujus synodi apud Muskilburgh celebrate die Lune [5 May 1242]' (SES, ii, 63).

clergy of the diocese to meet annually at the consistory after Easter - those of the archdeaconry of St Andrews meeting at the parish church of St Andrews, and those of the archdeaconry of Lothian meeting at St Giles in Edinburgh.[1] The purpose of the three statutes relating to this consistory was administrative,[2] similar to the purpose of a synod, and clearly these gatherings had time for such general business as the two resignations made 'in full consistory' in St Giles in 1293;[3] but a sentence passed in the consistory of Edinburgh in 1314/15 shows that judicial duties were also an early feature of these assemblies.[4] Nevertheless, before we can conclude that the consistory absorbed the judicial role of the diaconal chapter (and officials are not found adjudicating at such chapters after the thirteenth century) we must face an apparent contradiction: on the one hand we have the gathering of all the clergy of the archdeaconry in one church just once every year (and it could hardly be expected to occur more often) and which can have lasted only a few days,[5] and on the other we have the judicial needs of an area probably very much larger than that which had formerly been the responsibility of the chapters.

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1. Ibid., ii, 70.
2. Ibid., ii, 70-71.
3. Liber Cartarum Sancte Crucis [Holyrood Liber] (Bannatyne Club, 1840), p.81.
4. Dunfermline Registrum, pp.233-5.
5. The statute does not say how long the 'annual consistory' was to last but the two subsequent statutes refer to what should be dome during 'those days' (dictis diebus) (SES, ii, 70).

The solution of this problem must begin with a re-reading of the particular statute relating to the annual consistory. Joseph Robertson, the editor of the Statuta, labelled the statute with his own heading 'de consistorio semel in anno tenendo'[1] and this was rendered in David Patrick's English translation as 'of holding a consistory once a year'.[2] This is not the precise sense of the Latin. What the bishop required was that:

> 'Omnes ecclesiarum rectores vicarii presbyteri parochiales et ceteri capellani, tam pro animabus quam pro capellanis celebrantes, conveniant semel in anno scilicet proximo consistorio nostro post Resurrectionem Dominicam tenendo.'[3]

or in other words, that all the clergy are to *assemble* once a year and that this assembly is to take place at the first consistory after Easter. It seems clear that there was more than one consistory a year and that it was not solely the gathering of the clergy that made a 'consistory'. The statute provided for the annual assembly to take place some time after Easter. This seems to have become the accustomed time to hold diocesan synods which, in the sixteenth century at least, took place shortly after Easter in the dioceses of St Andrews and Dunblane.[4] In view of the travelling involved a mid-winter date for so large a gathering would hardly be expected, yet the consistory of 1293 was held on the Saturday before the feast of St Thomas the apostle (which falls on 21 December)[5]

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1. Ibid., ii, 70.
2. Patrick, Statutes, 74.
3. SES, ii, 70.
4. See above 59-60.
5. Holyrood Liber, 81.

while the consistory at which a sentence was passed in 1314/15 was held on the day after the feast of St Scolastica (which falls on 10 February).[1] Although these examples may considerably pre-date the statute in question, they lend weight to the idea that regular consistories were being held from as early as the end of the thirteenth century.

At the annual assemblies it was intended that the clergy should receive general instructions as to their conduct and duties and that they should bring with them reports of moral delinquents in their parishes and of the deaths that had occurred there during the year;[2] in short, the purpose seems to have been largely administrative, similar to that of the synod. Thus it may have been that the other consistories of the year were left free to deal more exclusively with judicial business. Unfortunately we have no detailed records of the attendance at these consistories but such evidence as there is tends to support this theory. The resignations made at the consistory of 1293 were witnessed by John de Tinwald who was a doctor of civil law and a commissary of the official of St Andrews,[3] by Alpin de Strathearn who was then the king's treasurer but who had been both archdeacon and official of St Andrews,[4] by Master Thomas de Bonkill who was 'probably a canon lawyer',[5] and by the rector of Keith.[6] The dispute heard at the

1. Dunfermline Registrum, 233-5.
2. SES, ii, 70-71.
3. Watt, Dictionary, 425-6.
4. Ibid., 521-2.
5. Ibid., 55.
6. Holyrood Liber, 81.

consistory of 1314/15 was conducted quite definitely 'coram nobis officiali curie Sancti Andree' and was sealed by the official with his seal and with that of the bishop.[1] Similarly a case settled peaceably in a consistory held in Glasgow in 1351 was sealed by the official only, in testimony of the agreement.[2]

Whatever the purpose of these consistories they were not yet permanent institutions. In 1314/15 the consistory at Edinburgh is recorded as being 'celebrated' in the same way as the chapters and synods of the thirteenth century,[3] and the same expression is used of the Glasgow consistory of 1351. At some point during the fourteenth century, however, it would seem that the consistory, or at least its judicial functions, acquired some degree of permanence.[4] It is tempting to see the beginning of this process in the record of the 1314/15 consistory where sentence was delivered 'in consistorio de Edinburgh in crastino sancte Scolastice virginis anni gratie MCCCXIV in consistorio ibidem celebrato', by giving to the first occasion of the word 'consistory' the meaning of the court or assembled tribunal where sentence was given, and to the second the

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1. Dunfermline Registrum, pp.233-5.
2. Cambuskenneth Registrum, p.204.
3. See above, 86.
4. This process was not confined to Scotland: the decline of regular synods has been noted in the fourteenth-century diocese of Worcester where, it has been suggested, 'the growth of the bishop's courts, in particular of the consistory with its regular sessions in various parts of the diocese, made the judicial activity of the synod less necessary'. (Haines, Worcester, p.88).

meaning of the consistorial day or event which was currently being 'celebrated'. Such a reading corresponds closely with the early evidence of the consistory court at Canterbury where 'consistory' referred to the sessions of that court which, in the fourteenth century, usually occupied a space of three days at intervals of three weeks: 'cases introduced in one "consistory" were usually heard again on the same court day of the next "consistory"'.[1] Although the clerk of the Edinburgh consistory may merely have repeated the word through carelessness the idea of the consistory as an established place does seem to have been emerging in preference to the idea of a consistory as an occasional event. By 1410 business was transacted in 'the consistorial place' (in loco consistoriali) in Glasgow cathedral,[2] while by 1477 a similar place in St Giles was described as 'usual and accustomed'.[3] By the sixteenth century 'consistorial places' are found in almost every diocese - usually located in the cathedral church[4] - while the term 'consistorial court' was eventually applied to the officials' courts in both Glasgow and Edinburgh.[5] Once established the Lothian

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1. Woodcock, Canterbury, p.32.
2. Melrose Liber, ii, p.510.
3. 'In ecclesia beati Egidii de Edinburgh loco consistoriali eiusdem solito et consueto' (RMS, xix, no.149).
4. E.g. at Dunkeld (Arbroath Liber, ii, 274), Dunblane (Inchaffray Charters, 148-50) and Moray (SRO, Mey Papers, GD96/38). There was also a 'consistorial place' in the chapel royal at Stirling (Chapel Royal Acta, fo. 2v).
5. The Acts of the Lords Auditors of Causes and Complaints, ed. T. Thomson (Edinburgh, 1839), p.131; Prot. Bk. Johnson, 7.

court is seldom found removed from Edinburgh: it seems to have taken temporary refuge in Musselburgh from the plague of 1530[1] but it appears to have remained unmoved in the face of the epidemic which sent the court of session scurrying to Linlithgow in 1545,[2] while the suggestion that proceedings should be suspended in the face of an advancing English army in 1548 went sternly unheeded.[3] In general, as will be seen later,[4] the record of the Lothian court in the face of political and social disturbance was a creditable one.

2. THE SESSIONS OF THE COURT

The official's court had thus evolved as a permanent establishment with regular sessions - a development that had no doubt been encouraged by the institution of a separate officialate for the archdeaconry of Lothian in the late fourteenth century,[5] which had removed the need for the official to divide his time between the areas to the north and to the south of the Forth. Just how regular the sessions of the court were can be charted from the evidence of the surviving Lothian and Dunblane Act Books. At first sight neither court seems to have observed a regular pattern of sessions: the days of sessions in the Lothian Acta II differ

1. Cf. below, 317.
2. RPC, i, 5.
3. Acta I, fo. 412v.
4. See below, 314-23.
5. See above, 52.

from those in Acta I and both differ from those in the Dunblane Acta, where the court seems to have sat on Sundays, on Easter Day or on any other day that took its fancy. Clearly each court must have followed its own code of practice but the principal key to this apparent disparity lies in appreciating a basic division between two types of business carried on in these courts. This division will be the subject of a fuller discussion later[1] but it will be necessary here briefly to anticipate the argument. A large number of entries in the Lothian Acta I and in the Dunblane Acta, and almost all of the enties in Lothian Acta II, are records of acts of monition - that is to say, they do not record judgements or stages in a suit but judicial warnings to perform a specified task; in general they relate to minor business transactions and debts and may be compared to the registration of contracts. This business was clearly regarded as a separate function of the court of the offical or commissary, and as it was one which must have played an important role in the life of the community it was clearly desirable that it should not be tied to the regular sessions of the court. Thus we find in the Dunblane Acta the start of the summer vacation of 1551 noted on 29 August[2] and then followed by twenty-seven items of business before 'First Hearing' (prima audientia) marks the beginning of the new term on 5 October.[3] Similarly, in Acta II the seemingly irrelevant heading 'First Hearing' is used at the end of a

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1. See below, 180-7.
2. 'Indictio feriarum' - literally, 'the announcement of the holidays', (Dunblane Acta, fo. 88v).
3. 'Prima audientia' (ibid., fo.90v).

week of business to indicate the start of the actual judicial term.[1] With this division of business in mind, and by using the three records in conjunction, we can obtain a clear picture of the four terms or sessions annually observed by these courts.

The first session after Christmas began invariably on 2 January at both Edinburgh and Dunblane[2] (or on 3 January when the second fell on a Sunday)[3] and ended at Easter. The length of the Easter break seems to have been the same for both courts with the first hearing occurring on the Monday after the first Sunday after Easter (the Sunday known as 'dominica in albis')[4] or on the Tuesday if Monday was a feast day.[5] The next long break was not until August but it would seem that at Edinburgh at least the intervening period was divided into two separate terms. It was the custom at the court of arches in London to begin a new term on Trinity Monday (eight days after Whitsun);[6] the Lothian court observed a break of four days after Whitsun, beginning on the following Friday, and there is a note of a 'First Hearing after Pentecost' on 3 June 1547 in Acta I[7] and a similar note in Acta II on the Thursday after Whitsun in 1551 after two days of monition business.[8] This break of session does not seem to have been observed at Dunblane where

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1. E.g. Acta II, fo. 225r.
2. E.g. Acta I, fo. 261r; Dunblane Acta, fo. 1r.
3. E.g. Acta I, fo. 40v.
4. E.g. Dunblane Acta, fo. 40r; Acta I, fo. 138v.
5. E.g. in 1552 when Monday 26 April was the feast of St Mark.
6. C.R. Cheney, A Handbook of Dates (London, 1970), 73.
7. Acta I, fo. 176r.
8. Acta II, fo. 73v.

there is no note of 'First Hearing' after Whitsun and where the resumption of judicial business after the festival varied from Wednesday in 1552 to Thursday in 1554 and Friday in 1553.[1]

The principal summer vacation began for both courts in late August and was occasioned, as the commissary of Dunblane declared, by 'the necessity of the harvest and of gathering in the fruit'.[2] The uncertainty of the harvest probably accounts for the varying lengths of the vacations devoted to it. The Dunblane records are the most precise here with the commissary announcing the 'ferias' on the last Saturday of August and giving at the same time the date on which the court was to reassemble, usually the beginning of the second week in October which allowed for an average break of six weeks.[3] A similar arrangement seems to have prevailed in the Lothian court where the first hearing usually took place in early October; an exception was in 1547 when the court did not re-assemble until 29 October, probably reflecting the disturbances caused by the English invasion and the battle of Pinkie in September of that year.[4] The final session of the court then ran until Christmas Eve.

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1. Dunblane Acta, fos. 181r, 369r, 286v.
2. 'Ob necessitatem messium et frugem colligendi' (ibid., fo.88v).
3. E.g. 29 Aug. - 5 Oct. 1551; 27 Aug. - 17 Oct. 1552; 26 Aug. - 9 Oct. 1553; 25 Aug. - 8 Oct. 1554.
4. The autumn session in Edinburgh in 1546 began on 11 October, and subsequent summer vacations were as follows: 30 Aug. - 29 Oct. 1547; 25 Aug. - 8 Oct. 1548. Acta II records two 'First Hearings' at this season: 13 Oct. 1550 and 10 Oct. 1552. There is little comparable evidence for the court in St Andrews but it may be noted that the principal's Sentence Book begins with a lengthy and formal preamble on 10 Oct. 1541 (Sent. St A., fo.3r).

During these four sessions - from 2 January to Easter, from Easter to Whitsun, from Whitsun to the end of August, and from October to Christmas - the court was in session on every week-day with the exception of those which fell on a saint's day or a festival. In general the days observed as dies non sessionis were similar to those observed by the court of arches[1] but the practice of each court differed slightly. The following days were observed as dies non in the courts of Lothian and Dunblane, with the exception of those marked by an asterisk which were observed in the Lothian court alone: Epiphany (6 January); Conversion of St Paul (25 January)*; Purification of the B.V.M. (2 February); St Matthias (24 February); Shrove Tuesday*; Annunciation of the B.V.M. (25 March)*; St Mark (25 April); Sts Philip and James (1 May); Holy Cross (3 May); Ascension Day; St Barnabas (11 June); St John the Baptist (24 June); Sts Peter and Paul (29 June); Lammas (1 August); St Lawrence (10 August); Assumption of the B.V.M. (15 August); St Bartholomew (24 August); St Luke (18 October); Sts Simon and Jude (28 October); All Saints (1 November); 3 November (the significance of this date is not clear)*; St Martin (11 November); St Katherine (25 November)*; St Andrew (30 November); St Nicholas (6 December)*; Conception of the B.V.M. (8 December); St Thomas (21 December). Thus in an average year, allowing for Sundays, feast days and vacations, between 130 and 140 days would not be available for regular contested business in the courts of Lothian and Dunblane. While this may seem an unduly large number it should be remembered that the period for which the courts were fully available, and which

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1. Cf. Cheney, Dates, p.73.

amounted to almost two thirds of the year, compares favourably with the records of contemporary secular courts;[1] in addition there were, as we have seen, considerably extended facilities for the conduct of monition business which formed a large part of the courts' duties. It is interesting to note that despite the regular observance of these various festivals the members of the court themselves seem to have taken little account of them. It was the practice in the sheriff courts for a case which had been continued to a day on which the court did not sit to 'fall asleep', a new summons being required for its resumption.[2] The Lothian Acta are full of occasions when a new diet in a case was assigned to a dies non[3] or even to a day during the harvest vacation,[4] but the actions reappear without fuss on the next available court day - albeit months later.[5]

Evidence relating to the times of the daily sessions is very scarce and it is difficult to come to any firm conclusions. It will be remembered that the sheep in Henryson's fable was summoned to court after sunset and that he rightly objected that 'no judge should sit in Consistory so late at even'.[6] While Henryson was concerned with exaggerating the illegality of the sheep's trial there

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1. See below, 275-7. The court of arches appears to have been closed to regular business for about 220-230 days every year.
2. Fife Court Book, pp.286-7, 315.
3. E.g. Acta I, fos. 25v, 27r, Sinclair v. Henrison.
4. E.g. ibid., fo. 229r, Ker v Lauson.
5. Sometimes the clerk notes that an action was being resumed where it had been left off (ubi dimissum est).
6. See below, Appendix I, p.335, ll. 55-56.

clearly were lawful times prescribed for the session of all courts, whether ecclesiastical or secular. The abbot of Cambuskenneth had opposed a decree by the lords of council in 1501 on the grounds that it had been given before nine in the morning, which was the hour of cause;[1] whether or not this was the hour of cause every day is not clear but when the court of session was established in 1532 the lords were required to convene at 8 o'clock in the morning or at nine on 'preaching days'.[2] The expression 'hour of causes' (hora causarum) is frequently used in reference to the ecclesiastical courts, but seldom defined.[3] The earliest hour that we find mentioned is nine o'clock when a sentence was passed in the official's court of Dunkeld in 1492.[4] Ten o'clock occurs more frequently and seems to have been particularly favoured in heresy trials, being the time chosen for Patrick Hamilton to appear in the cathedral at St Andrews[5] and for the heretics summoned by the archbishop of Glasgow to appear in Glasgow cathedral.[6] Ten seems also to have been a common time for the issue of legal documents such as the form of appeal that was drawn up in 'the consistorial place' in St Giles in 1535,[7] or the citation that began the Eglinton divorce proceedings in 1562.[8] Later times are also found: a sentence of

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1. ADC, xlvi.
2. Hope's Major Practicks, 1608-33, ed. Lord Clyde (Stair Society, 1938), ii, 15.
3. E.g. 'hora causarum ante meridiem' in the Eglinton divorce (Fraser, Eglinton, 173).
4. Arbroath Liber, ii, 274.
5. Herkless and Hannay, Archbishops, iii, 253.
6. St A. Form., ii, 72.
7. SRO, Dalhousie Munis., GD45/16/2752.
8. Fraser, Eglinton, 163-4.

excommunication was delivered in St Giles in 1493 at eleven o' clock,[1] and a sentence occurring in Dunblane cathedral in January 1462 'in the usual and accustomed consistorial place and at the due hour of causes' was noted by the clerk at the end to have taken place at eleven o'clock or 'eocirca'.[2] In 1448 the archdeacon of Brechin was cited to appear in court at midday.[3] If one thing emerges clearly it is that no business seems to have been transacted during the afternoon; this was certainly the case in the court of session where that time was set aside for the examination of witnesses as the need arose[4] and it may be that a similar arrangement had been adopted in the official's court in St Giles.

3. THE OFFICERS OF THE COURT

(i) The Officials

Presiding over these courts were the officials who, as we have seen, were the bishops' chief judges in instance business. There is no scope here for detailed biographies of all the men who presided as officials in the St Andrews courts, but instead we may look at a number of aspects of their various careers which help to shed some light on the types of men who held this office. There was, for example, a strong link between the principal officialate and the

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1. Glasgow Registrum, ii, 485.
2. 'In loco consistoriali solito et consuento hora causarum debita' (The Chartulary of Inchaffray [SHS, 1908], 148-50).
3. Brechin Registrum, i, 153. He was to be present at the swearing-in of witnesses.
4. Acta Sessionis (Stair), xv.

university of St Andrews in which five of the sixteenth-century officials principal held high office. There was also a similar link between the officials of Lothian and the central courts of the state, and the ecclesiastical judges played an important role in the court of session. Amongst the officials as a whole there was a high degree of both learning and professionalism, and many of them had acquired experience of the working of the courts in the capacity of procurator or commissary before being appointed to the officialate.

The close connection between the officials principal and the university is particularly striking. David Meldrum, whose twenty-five year officialate included the first years of the sixteenth century,[1] played an important part in university affairs[2] and set the pattern for his successors. Hugh Spens, a man of 'wisdom and tact'[3] and a colleague of John Major, had been both dean of Arts and rector of the university and he held the provostship of St Salvators throughout his service as official principal.[4] Spens was followed as official principal by John Weddel who, in addition to a long and distinguished career in the church courts,[5] was several times elected rector of the university.[6] Of all the officials

1. Watt, Fasti, p.324.
2. St A. Acta, xxiv and passim.
3. Ibid., xlii.
4. Ibid., pp.218-19,303,279 and passim. Spens was official principal 1505-1516 (Watt, Fasti, p.324).
5. Weddel was official principal 1517-1523 and 1530-1533; he was official of Lothian 1533-1540 (Watt, Fasti, pp.324-6). See below, Appendix II, p.342.
6. St A. Acta, ccxlvi-ccxlvii.

principal who were involved in the life of the university, however, the most prominent was Martin Balfour.[1] A nephew of Hugh Spens, Balfour was elected dean of Arts in 1522 and held the post for twenty-three years;[2] he was, it seems a 'tactful chairman' during a very troubled period in the university's history and he 'kept the administrative machinery running, however inadequately'.[3] From 1540 to 1545 he held the post of official principal and in the last years of his life he followed Hugh Spens and John Major in the office of provost of St Salvator's college.[4] Nor did the university connection cease with Martin Balfour: his successor as official principal, John Spittal,[5] was 'one of the first canonists of Aberdeen'[6] and was elected rector at least twice in the late 1540s, while the last official principal of all, William Cranston,[7] succeeded Martin Balfour as provost of St Salvator's[8] and seems to have held the two posts concurrently until the end of the decade.

The careers of these men are a significant feature of a development that was noted by Dr Dunlop - the increasing interest in legal matters in the sixteenth-century university: 'thus in 1543-44 James Rolland vicar of Glamis, Patrick Scott and Walter Fethy

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1. See below, Appendix II, pp.344-5.
2. St A. Acta, lvi.
3. Ibid., lviii.
4. Ibid., cclxiv.
5. See below, Appendix II, p.345-6.
6. St A. Acta, lxxiv.
7. Official principal 1553-1558 (Watt, Fasti, p.325).
8. St A. Acta, cclxiv.

were described as juris peritos; in 1550-51 William Arthour is styled utriusque juris peritissimum and Fethy advocatum, and in the following year James Rolland and David Ogilvy are said to be advocatos et in utroque jure exercitatissimos'.[1] These names come as no surprise. Rolland, Scott and Fethy all served regularly as commissaries in the official's court in St Andrews during the 1540s and 1550s,[2] and one could add the name of Robert Davidson who also served as commissary as well as holding various offices in the university.[3] William Arthour was also a practising lawyer and occurs also as procurator fiscal of the archbishop,[4] and although David Ogilvy does not appear by name in the court records it seems likely from his description as advocatus that he would have served there as procurator. Dr Dunlop was interested in the involvement of lawyers in university affairs, but the involvement in the opposite direction is equally significant. The judges and lawyers of the official's court in St Andrews were in constant contact with the mainstream of contemporary legal study; they were in contact also with some of the most distinguished scholars of the day, scholars like John Major who has been described as not only St Salvator's 'greatest ornament during the mediaeval period but the man whose outlook and achievements helped most to bridge the gap' between the university's pre- and post-Reformation history.[5]

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1. Ibid., cliv-clv.
2. Watt, Fasti, pp.329-30.
3. Ibid., p.328; St A. Acta, pp.235,244,245,269,303.
4. St A. Rent., p.196.
5. Veterum Laudes, ed. J.B. Salmond (Edinburgh, 1950), p.21.

Turning to the court of the official of Lothian we find that the most striking feature there is the connnection of the officials with the state judiciary. Of the eight men who served as officials of Lothian during the sixteenth century[1] three served concurrently as judges in the central courts: James Heriot and Thomas Coutts, who were appointed lords of council in 1517 and 1527 respectively,[2] and Abraham Crichton who was appointed to the court of session in 1548.[3] William Preston joined the court of session in 1553[4] after quitting the post of official, and this example was followed by that distinguished ecclesiastical judge John Weddel who had joined the court of session by 1548.[5] This easy interchange between the two jurisdictions is perhaps best illustrated by the career of James Balfour who succeeded to Abraham Crichton as official of Lothian in 1553 and retained the post until the Reformation; undaunted by this upheval Balfour changed course and ended his legal career as lord president of the court of session and as the compiler of Balfour's Practicks.[6]

This relationship with the civil jurisdiction was another important connection for the ecclesiastical judges, and it was one that was echoed in the careers of some of the official's court procurators.[7] We must constantly be on guard against implying too

1. William Wawane 1492-1515, James Heriot 1516-1521x1522, William Preston 1522-1524, Thomas Coutts 1524-1529x1530, James Simson 1530-1533, John Weddel 1533-1540, Abraham Crichton 1540-1553, James Balfour 1553-1557 (Watt, Fasti, p.324).
2. ADCP, pp.73,93,292.
3. See below, Appendix II, pp.343-4.
4. ADCP, p.411.
5. Ibid., p.574.
6. BP, i, pp.xiii-xxii.
7. See below 122-3.

great a gulf between the courts of church and state even if there was always the possibility, and especially after 1532, that the two would develop in different directions. It is a measure of the great degree of harmony between the two systems that judges were able to pass from one to the other, or preside in both concurrently, and that lawyers could practice in both ecclesiastical and lay courts without prejudice either to their own careers or to the interests of their clients.

The academic qualifications of the officials may have provided one reason for their desirability as judges; another may have been that their academic training was very often matched by a wide experience of the practice of law. Both Martin Balfour and Abraham Crichton gained early experience as procurators in the sheriff court of Fife;[1] Balfour went on to appear frequently as procurator for the abbey of Arbroath[2] while Crichton is found as procurator for the archbishop of St Andrews in the court of session in 1532.[3] Balfour also served regularly as commissary in the official principal's court in the 1520s and 1530s, as did two of his predecessors as official principal, John Weddel and John Spens.[4] Thomas Coutts served as both commissary and official in the diocese of Glasgow before being appointed to the officialate of Lothian in 1524.[5] Real experience of the working of the courts was

1. Fife Court Bk., pp.127,147.
2. Arbroath Liber, ii, pp.443,462,500.
3. Acta Sessionis (Stair), p.29.
4. Watt, Fasti, p.328.
5. Ibid., pp.189,191.

therefore not the least of the qualifications held by the officals.

In terms of professional ability at least the sixteenth-century officials were clearly amongst the leaders of the legal profession. Their talents were much in demand in other fields and they are found exercising many administrative functions such as examining the qualifications of clergy attending synods,[1] inquiring into cases of leprosy and conducting visitations.[2] It is less easy, however, to form a picture of the officials as individuals. They were, or were at least supposed to be, ordained priests.[3] Certainly the St Andrews officials all seem to have held benefices from which, no doubt, they drew part of their income. Abraham Crichton held four livings at the time of the Reformation,[4] while William Cranston was provost of Seton and rector of Kemback as well as being provost of St Salvator's,[5] and John Spittal held the Edinburgh provostship of St Mary of the Fields for almost the whole period that he was official principal.[6] In addition to their benefices officials probably had other sources of income as well. The appointment of John Lauder as clerk of the court of the official principal makes it clear that there was a well-defined proportion

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1. NLS, The Commonplace Book of John Gray, Adv. MS 34.7.3, fo. 30v.
2. See above, 71.
3. SES, ii, 172.
4. See below, Appendix II, p.
5. St A. Acta, lxiii n.
6. He was official 1546-1553 and provost 1543-1552 (Watt, Fasti, p.325,357).

of the profits of justice which belonged by custom to the official,[1] and at Dunkeld the offical was in receipt of an annual pension of five pounds from the bailies of Perth.[2] The average official was unlikely to grow rich in his post but some of them at least were probably men of substance. We do not know the extent of Abraham Crichton's estate when he died in 1563 but his son, George Crichton of Cluny, survived his father by only ten years and left over £2200 in his testament.[3]

The clerical status of the officials was, as might be expected, no guarantee of good conduct. Abraham Crichton appears to have had only this one son but Thomas Coutts, who was official of Lothian in the latter part of the 1520s,[4] had at least four children of whom three appear to have died in the epidemic of 1545.[5] This state of affairs did not go unnoticed and a sentence of 1547

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1. 'Salva tamen et reservata ac excepta parte emolumentorum et census dicti sigilli et aliorum accidentium et casualitatum officiali nostro S. Andree principali nunc et pro tempore existenti de antiqua et approbata dicte curie consuetudine antea annuatim seu ebdomidatim aut dietim percipi et solvi solitorum et consuetorum et absque ejusdem officialis principalis nunc et pro tempore existentis prejudicio' (St A. Form., ii, p.222). It is worth noting here the practice of the reformed commissary court of Edinburgh, which was closely modelled on the Lothian court (see below, 531): 'the profitis of all summoundis, actis, contractis, obligatiounis, sentences, transumptis, confirmatiounis, and registering of testamentis and uther writings quhatsumever, to be actit and registrat in the Commissaris bukis, and extractis thairof, and likewayis the profit of the signet, and seill thairof be dividit in maner following; that is to say; The Judge sall have the twa part thairof, and the Clerk the thrid part' (BP, ii, p.661).
2. Sent. St A., fo. 146r.
3. SRO, Edinburgh Testaments, CC8/8/3, fos. 196v-197v.
4. See above, 103n.
5. David, John and Elizabeth Coutts are recorded as having died bastards in that year (RSS, iii, p.221); another daughter, Katherine, survived (ibid., iv, p.178). For the plague of 1545 cf. below,

required a woman to make a public retraction of her accusation that a neighbour had 'swiffit with the old official';[1] although it is not made clear which official was supposed to have committed this vague but suggestive act, Coutts, at least, would have had cause to blush at such scandal.

(ii) Officials' Commissaries

One of the categories of commissaries which we have earlier distinguished consisted of those who acted as assistants or deputies to the officials.[2] In the Lothian court their chief function seems to have been to stand in for the official during his absence, although occasionally official and commissary appear together on the same day.[3] Between October 1546 and the beginning of the new term in October 1547 commissaries stood in for Abraham Crichton on only twenty-seven court days, but much clearly depended on the official's other commitments. After Crichton had been appointed a lord of session in February 1547/8 the demands on his time were clearly increased and a week later he was obliged to constitute commissaries in addition to those who were already serving.[4] Thereafter Crichton was able to spend less time in the Lothian court and of the 271 court days in the twelve months following his appointment to the session he was absent on 117, and on a further twenty-three he was assisted by commissaries.

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1. Sent. Laud., fo. 340r.
2. See above, 78.
3. E.g. 3 June 1547 (Acta I, fo. 176r).
4. Ibid., fo. 442r.

The commissaries do not appear to have been much less able than the officials. As we have seen they too were closely involved in university life in St Andrews and many of them subsequently became officials themselves. As commissaries they could exercise an authority equal to that of the official[1] and they are found fulfilling the same functions in Acta I - hearing causes and passing sentences, conducting monition business and appointing curators. Commissaries could also pronounce excommunications and absolutions and it was a commissary who, in 1548, pronounced a general absolution for all excommunicates who went to serve in the army against the English.[2] At times the experience or knowledge of these deputies would be inadequate for a particular problem, as in December 1546 when a commissary postponed the hearing of an action because 'the case is difficult and the official is away',[3] but there is little doubt that service as an official's commissary was a customary and important, though not essential, preliminary to becoming an official.

(iii) The Procurator Fiscal

After the official and his commissaries the most important group was that of the advocates, or procurators, and pre-eminent amongst these was the procurator fiscal. The duties of the

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1. John Weddell's appointment as official principal entitled him to appoint commissaries with an authority in relation to his own 'consimilem aut limitam' (St A. Form., i, p.32).
2. Acta I, fo. 444r.
3. Ibid., fo. 40r, Gudlac v. Scheill.

fiscal were not confined to the ecclesiastical court but his role in that court was an important one and deserves especial attention as it has been strangely overlooked by some recent writers. J. Irvine Smith noted that:

> 'The office of Fiscal appears in all courts, civil, ecclesiastical and criminal, from the earliest times and was, as the name suggests, the office charged with the collections of fines imposed by the court. In ecclesiastical courts the Bishop's Fiscal was concerned with confirmation of testaments and lodgings inventories so that the quot could be ascertained.'[1]

Seven years later, in 1965, W. Reid confirmed this role of the bishop's procurator fiscal in testamentary affairs but denied any connection between him and the later officer of the same name: 'the name of this functionary who ordinarily had no criminal duties seems to have given rise to some confusion'.[2] Reid argued that the later function of the procurator fiscal, of instigating judges to take cognisance of offences, was not native to Scotland but rather was developed in the French seigneurial courts and adopted by those Scottish burghs with the closest links with the continent:[3]

> 'Accordingly, one may reasonably conclude that the institution of the procurator fiscal was imported into Scotland from the continent, and more particularly France, around 1560 when French influence was at its height.'[4]

All the evidence goes to suggest, however, that so far from being

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1. J. Irvine Smith, 'Criminal Procedure', Scottish Legal History, p.436.
2. W. Reid, 'The Origins of the Office of Procurator Fiscal in Scotland', Juridical Review, x (1965), p.155.
3. Ibid., pp.154-7.
4. Ibid., p.160.

imported from France the 'criminal' role of the procurator fiscal had developed well before the Reformation and was to be found in the 1540s at no greater distance from the Tolbooth than the consistory aisle of St Giles.

Reid's conclusions are all the more surprising when we realise that there is preserved in the St Andrews Formulare a commission of appointment of a procurator fiscal. Archbishop Forman appointed Master J.S. 'our procurator and advocate fiscal, special and general, in all our causes spiritual, civil and criminal within the diocese and jurisdiction of St Andrews'.[1] The specific purpose of this commission (although the appointment was also 'general') was to take action against non-residents and the fiscal was particularly empowered to demand and obtain the removal of the disobedient and 'the decreet of sentences both interlocutory and diffinitive upon them, and to demand the execution of the same'.[2] Two points in particular emerge from this commission: firstly, the fiscal was emphatically a 'procurator and advocate' and competent in civil as well as criminal causes, and secondly, that he had a clear duty to seek out and prosecute, or cause to be prosecuted, any miscreants. These two responsibilties together illustrate the versatility of the ecclesiastical procurator fiscal.

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1. 'Procuratorem et advocatum nostrem fiscalem specialem et generalem in omnibus ... nostris causis spiritualibus civilibus et criminalibus infra nostram diocesim et jurisdictionem Sancti Andree' (St A. Form., i, p.18).
2. '[Potestas] eos merito provari et a suis beneficiis causantibus suis demeritis et inobedientiis amoveri et sententiam ac sententias desuper interlocutorias et diffinitivas ferri et promulgari petendi et obtinendi, easdemque debite executioni demandandi et demandari faciendi' (ibid., i, p.19).

Cardinal Betoun had two procurators fiscal whose role as advocates seems undeniable. Hugh Wishart, procurator fiscal in St Andrews, was paid an annual fee of £10 from 1539 until his death in 1545, together with various other allowances.[1] He performed a number of duties for the cardinal including riding to Stirling to purchase royal letters[2] and riding to Crail to serve the cardinal's citation,[3] but he appeared also as a procurator in the official principal's court - on one occasion on behalf of the rector of Fettercairn against his parishioners,[4] and on another on behalf of two executors dative and the commissary who had appointed them.[5] The cardinal's procurator in Edinburgh was Thomas Kincragy who appears to have been a distinguished lawyer in his own right. Named as one of the original 'procuratouris of the counsale' when the court of session was established in 1532,[6] Kincragy is found practising there in the course of the 1530s.[7] He was created Queen's Advocate in 1544 'in the absence of Master Henry Lauder, Principal advocate'[8] and was again named on the list of procurators chosen by the lords of council in 1548/9.[9] Kincragy practised as procurator in the Lothian court from at least as early as 1531[10] and is found as Archbishop Betoun's procurator fiscal in 1536;[11] he retained this

1. St A. Rent., pp.95,107,121,137,176; his death is recorded ibid., p.220.
2. Ibid., pp.178-9.
3. Ibid., p.201.
4. Sent. St A., fo. 73v.
5. Ibid., fo. 21v.
6. Acta Sessionis (Stair), xv.
7. E.g. ibid., p.29.
8. APS, ii, p.447.
9. ADCP, p.584.
10. SRO, Fraser Charters, GD86/96.
11. Sent. Laud., fo. 248r.

post under Cardinal Betoun who, at least between 1539 and 1545, paid him an annual fee of £13 6s. 8d. in four quarterly instalments,[1] and he continued active in this post throughout the period covered by Acta I. Within the official's court the procurator fiscal practised much as any other procurator and seems to have been free to serve the interests of a lay client,[2] but in the greater part of his twenty-three appearances in the Lothian court between October and December 1546 he was moving or conducting actions on behalf of clerics or ecclesiastical foundations. Thus an action following on an armed attack made on the convent of Haddington was brought by Prioress Elizabeth Hepburn and 'Thomas Kincragy, procurator fiscal, for his interest' (pro suo interesse - the term also used when a husband appeared for his wife, or a guardian for his ward).[3] Similarly, Kincragy appeared for the abbey of Newbattle in an action against their tenants,[4] for the dean of Haddington (as representative of the late cardinal) against the Friars Preacher,[5] and for a priest who had been attacked and wounded by a layman.[6]

As an advocate the principal duty of the procurator fiscal seems to have been to conduct actions on behalf of churchmen who had come into conflict with the laity or, as in the case of the dean of Haddington, to defend the interests of his employer. In addition

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1. St A. Rent., pp.95,107,121,137,176,197,209.
2. E.g. he appeared in an action revolving around the price of a barrel of salmon (Acta I, fo. 16r).
3. Ibid., fo. 7v.
4. Ibid., fo. 5r.
5. Ibid., fo. 27v.
6. Ibid., fo. 29v, Makinath v. Polwarth and West.

to this there were those duties that pertained to a more purely 'criminal' jurisdiction and which involved the fiscal moving an action on his own initiative. It was suggested earlier that while the official himself had no power of ex officio jurisdiction - that is to say, his office carried no authority to promote actions - he might nevertheless hear any causas criminales that were legitimately brought before him.[1] Such a case arose out of an action brought in the Lothian court in October 1546 where three witnesses admitted to having given false evidence; they were immediately cited to return to court at a later date and answer 'ex officio and at the instance of the procurator fiscal'[2] although the fiscal had had no previous involvement in the case. In due course the witnesses reappeared before the official, at the instance of the fiscal, and were sentenced to be punished as perjurers.[3] A similar role seems to have been performed by the procurator fiscal in Dunblane where on one occasion we find the bishop ratifying and confirming John Learmonth in the office of procurator fiscal and especially in his (the fiscal's) action against one Robert Stewart in the matter of his wife.[4] On another occasion an action in the Dunblane court for separation was interrupted when the fiscal introduced an action against the wife for taking communion on Easter Day while she was excommunicate, an action promoted originally by 'the dean of pravity for excesses';[5] and a priest who was accused of attacking and mutilating a layman

1. See above, 72.
2. Acta I, fo. 4v.
3. Ibid., fo. 23r.
4. Dunblane Acta, fo. 405v.
5. Ibid., fo. 42v.

was cited at the instance of the procurator fiscal to answer to the 'ex officio accusations'.[1]

The procurator fiscal thus filled the valuable role of a link between the separated channels of criminal and instance jurisdiction. This is particularly well illustrated by the perjury case in the Lothian court where the ordinary court machinery had no means of dealing with matters of a criminal nature arising out of its regular business.[2] In other dioceses the exact status of the episcopal procurator fiscal may have varied. The confirmation of John Learmonth as fiscal by the bishop of Dunblane was repeated at a later stage in the case of the violent priest, at the point where the formal libel was brought against the accused; in this case it was the procurator Drummond who was orally constitued procurator fiscal[3] and it may have been that the office had not yet acquired at Dunblane the permanence which we find in the Lothian court, and the title may well have been applied to the bishop's particular legal representative ad hoc. Certainly in the diocese of Moray there could be more than one procurator fiscal, because an

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1. 'Responsurus ... super sibi objiciendiis ex officio' (ibid., fo. 171v).
2. It should be emphasised that perjury was a very different matter from contumacy, which generally involved the non-appearance of a party or witness and which was a regular occurrence. Perjury in court actions appears to have been particularly singled out from an early date as an offence answerable to the bishop alone (see above, 55-56).
3. 'Drummond procurator fischalis vive vocis oraculo dicti reverendi hodie ad effectum predictum constitutus' (Dunblane Acta, fo. 171v).

appeal made from that diocese to the official principal was made against 'Master Thomas Hay procurator fiscal of the present bishop of Moray and against his other procurators fiscal'.[1] In the diocese of St Andrews, however, there is little doubt that the procurator fiscal was a permanent and salaried officer with a wide range of duties. Although Thomas Kincragy seems to have practised principally in the court of the official of Lothian, he was obviously a distinguished figure also in the court of session, and there seems little need to look to France to find the origins of the modern procurator fiscal.

(iv) The Procurators

As the chosen representative of both the queen and the cardinal Kincragy must have been one of the most distinguished members of the ecclesiastical 'bar' in Edinburgh, but he was only one of a large number of procurators who were practising in the Lothian court at the time. On the principle that 'feudal procedure, formalist and oral, did not admit of representation',[2] the large and skilled corps of procurators in the Lothian court may be seen as a mark of the comparatively advanced development achieved by the ecclesiastical courts. The use of procurators had a long history in the church, not just in the sense of general representatives but specifically in the sense of court advocates; their

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1. Sent. St A., fo. 104r.
2. ADC, xlvii.

employment is regarded as being a 'familiar item of Romano-canonical practice as early as the beginning of the thirteenth century',[1] and we find them in action in the official principal's court in St Andrews in the early fourteenth century.[2] The regular employment of advocates in the secular courts by the early fifteenth century may have owed something to this early ecclesiastical development, and we find the oath of calumny - familiar from ecclesiastical practice[3] - being enjoined upon advocates by parliament in 1429.[4]

During the period covered by Acta I there were at least thirty procurators practising in the Lothian court. The ecclesiastical authorities took some pains to oversee the lawyers' activities and among the statutes of 1549 were regulations which forbade procurators to undertake cases unless they had fully acquainted themselves with the facts and were satisfied as to their acceptability in law; steps were to be taken against those who promoted unjust causes solely for the sake of the fees, and the procurators were respectfully to keep their places until their client's case was called and they were then to address themselves briefly to the business of that particular diet.[5] It is not difficult to understand why some regulation was needed. The great majority of contested actions in the Lothian court involved the employment of

1. Habakkuk Bisset's Rolment of Courtis, ed. P.J. Hamilton-Grierson (Scottish Text Society, 1920-26), iii, p.23.
2. SRO, RH6/76.
3. See below, 209.
4. APS, ii, p.19.
5. SES, ii, pp.121-3.

procurators; during the term between October and Christmas 1546 - which involved fifty-three court days - seventeen procurators made a total of 682 separate appearances on behalf of their clients, and on a busy day a dozen lawyers might be jostling for places within the constricted area of the court.[1]

Unless a procurator was employed on a permanent retainer, much as was Thomas Kincragy by the cardinal, he would be 'constituted procurator' to represent a party in a particular case. This could be done in the course of the daily court proceedings and the formal record differs little between courts:[2] the client constituted one or more procurators to represent him either generally, in all his (unspecified) business,[3] or specifically in a particular action.[4] The terms of the appointment would usually include the 'right of substitution' (potestas substituendi) whereby the procurator could appoint a substitute to take his place, and a record that the client had undertaken to ratify his procurator's actions on his behalf (promisit de rato). According to Balfour, no procurator could proceed without this express ratification (for which the contemporary term appears to have been 'ratihabition'), and if he held only a general mandate of procuratory he had first to find a suitable caution or pledge 'de rato' as a guarantee of his client's subsequent

1. E.g. on Tuesday 7 December 1546 eleven procurators made twenty-nine separate appearances on behalf of clients, and this was not exceptional.
2. Cf. Chapel Royal Acta, fo. 1r; Acta Admirallatus, p.6.
3. E.g. 'ad omnia et singula negocia sua' (Chapel Royal Acta, fo. 3r).
4. E.g. Acta I, fo. 448r.

ratification.[1] A similar practice seems to have been observed in the official's court. By making a general 'constitution' of one of, or even all, the procurators of the court[2] the client could be assured that his interests would be looked after without the need for him to make a personal appearance at the beginning of an action. This seems to be why we find that on 6 April 1547 'Master John Stevenson accepted the duty of procurator (onus procurandi) for William Purves against Walter Wright, to appear on Saturday next and to answer according to law in the name of procurator to the said William, and to find sufficient caution de rato'.[3] A client might also appear in court in person during the course of an action expressly to ratify the actions of his procurator,[4] though whether this was because the procurator's authority had been challenged or whether it was merely necessary that the client should appear at some point and give the formal 'ratihabition' for which the procurator had already made pledge is not clear.

The appointment of a procurator seems to have involved little formality and it may have been the case that a handshake in

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1. BP, ii, p.299. The official made a similar undertaking 'de rato' when he appointed new commissaries (Acta I, fo. 442r).
2. E.g. 'quo die Joneta Dunkeson ... (et al.) fecerunt constituerunt ordinaverunt et creaverunt venerabiles viros dominos et magistros Johannem Crathe vicarium pensionarium ecclesie parochialis de Striuveling Johannem Abircrummy Alexandrum Chalmer Robertum Learmonth et alios procuratores curie ...' (Chapel Royal Acta, fo.1r).
3. 'Magister Johannes Stevinson acceptavit onus procurandi pro Willelmo Purves contra Walterum Wrycht ad comparendum Sabbati post proximum et respondendum prout de jure procuratorio nomine dicti Willelmi et inveniendum cautionem de rato' (Acta I, fo. 137v).
4. E.g. 'comparuit Thomas Cochrane et ratificavit singula gesta per suum procuratorem facta et signanter ubi detulit contenta in asserto libello reconvencionis juramento Loutefute et sponse' (ibid., fo. 270v).

the presence of the court was all that was needed to seal the agreement.[1] Surprisingly there are few records of these constitutions in the Act Books, although there was a flurry of activity in the week before the beginning of the October term of 1548 when eight different parties appointed their advocates, so it may have been that it was more usual to make the necessary arrangements outside court hours in the presence of a notary or witness.[2] On one occasion a Master Peter Spens is described as procurator 'per mandatum productum';[3] as he was not one of the court's regular procurators, and this was his only appearance, the production of his credentials was perhaps necessary and noteworthy where those of the more familiar lawyers would have been taken for granted. The presence of a procurator was seldom noted at the primary stage of registering the libel or petition and indeed many parties may have waited until this stage was past and their action safely launched before going to the trouble and expense of retaining a lawyer. As procurators were not required in monition business or in administrative matters such as the appointment of executors there seems, at first sight, to have been much judicial activity in the Lothian court that did not involve their employment; but if we

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1. 'Promisit de rato per manus sue dextre extensionem' (ibid., fo. 448r).
2. Cf. the practice in Canterbury where 'if the proctor was appointed apud acta, during the public session of the court, no witness to the "constitution" was necessary, but if a proctor was "constituted" out of court, then the presence of two witnesses was required ... When the proctors appeared in court to represent their "lords" they provided material evidence of their appointment, or took an oath that they had been appointed by the particular person they claimed to represent' (Woodcock, Canterbury, p.52).
3. Acta I, fo. 10r, Robeson v. Crawford.

disregard these entries, and also the entries recording the first stage of suits, and concentrate on the occurrence of actions in progress we find that of 566 such entries between October and December 1546 almost 400 record the involvement of one or more procurators.

Once the action had begun the procurator could not be removed by his client[1] and he was free to conduct the action as he saw best. Substitutions were occasionally made in protracted cases,[2] but in general the procurators saw their cases through to the end. For the busiest of lawyers this could involve a great deal of work as some cases might run to more than thirty separate diets.[3] A full list of procurators practising in the Lothian court at this time is given in the appendix[4] but a few of them stand out in particular from the sheer extent of their commitments. During the fifty-three court days of the term before Christmas 1546 Robert Wilson made 144 separate appearances on behalf of clients, John Abercrombie made 107, John Peblis made ninety-three, Thomas Sleichman seventy-three and Thomas Weddel sixty-nine appearances; a busy day like 7 December could involve Abercrombie appearing on behalf of seven different clients in the course of a morning.[5]

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1. Ibid., fo. 30r.
2. E.g. ibid., fo. 379v, Blackstock v. Machane.
3. E.g. the action of Rovert Ker v. James Lauson of Humbie which began on 9 December 1546 and ended its thirty-fifth and final diet on 12 June 1548.
4. See below, Appendix II, pp.347-8.
5. Acta I, fos. 26v-27v.

The number of procurators practising in the Lothian court is particularly striking when compared with the maximum limit of ten placed on the admission of advocates to the court of session[1] and raises the question of whether all thirty ecclesiastical procurators enjoyed the same status. It has been suggested that in the civil courts there was a difference between advocates and procurators - that the latter 'were perhaps inferior (as they were in France, although united in the same confraternity of St Nicholas) to the advocates',[2] but no such distinction seems possible in the Lothian court where the term 'procurator' was in exclusive use. Nor can any distinctions be made on the basis of academic qualifications since although some procurators are recorded with the title 'magister' and some are not, its application is clearly at random and according to the whim of the clerk;[3] at least four procurators may be identifiable with St Andrews graduates of the same name,[4] but it seems unlikely that the remainder would lack a similar training. Almost all of them were laymen and of the four who are titled 'dominus' only one appears to have been in regular practice. Balfour noted that no 'ecclesiastical person'

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1. R.K. Hannay, The College of Justice (Edinburgh, 1933), pp.137-8. This number is even more remarkable when it is compared with the evidence of English courts. The number of procurators in the Canterbury consistory court reached a peak of eight or nine in the late fifteenth century (Woodcock, Canterbury, pp.40-41); the number of regular procurators appearing in the courts of Winchester and Norwich before the Reformation was never more than three or four (Houlbrooke, Church Courts and People, p.28).
2. ADC, xlviii.
3. Various references to 'Master John Abercrombie', 'John Abercrombie' and plain 'Abercrombie' mean that those whose names appear only once and untitled in witness lists at sentences cannot be dismissed as unqualified.
4. Viz. John Abercrombie, John Peebles, William Wightman and Thomas Sleichman (St A. Acta, pp.376,337,358,361).

might be a procurator before either a temporal or an ecclesiastical judge unless speaking 'for himself, his own kirk, or for the miserable and convict persons',[1] so it may have been that the role of the procurator Sir John Ker, whose clients have no obvious ecclesiastical connections, was that of advocate for the 'miserable persons'.[2]

Nevertheless the indications are that there were indeed considerable differences in the relative standing of these men. Considering the position in 1567 R.K. Hannay noted 'the growth of a body of procurators on the outskirts of the session, anxious individually to be received within the circle of licensed counsel', and that it was reported in the same year that 'of procurators and advocates the greatest plenty are at Edinburgh'.[3] Both statements could have applied equally to the period before the Reformation when, in addition to the advocates employed in the official's court and in the court of session, there were over thirty more to be found practising in the court of admiralty.[4] Amongst this great number of lawyers there were clearly some who practised in all three courts. Both John Abercrombie and Thomas Weddel are found in the Admiralty court[5] as are two other Lothian court procurators, George

1. BP, ii, p.298.
2. Cf. below, p.123n.
3. Hannay, College of Justice, pp.138-9.
4. Acta Admirallatus, xxvi.
5. E.g. ibid., pp.147, 87. They occur also in the records of the burgh court of Edinburgh (Extracts from the Records of the Burgh of Edinburgh [Scottish Burgh Record Society, 1869-92], ii, pp.167, 189,209).

and Richard Strang.[1] Similarly the list of procurators chosen by the lords of session in 1549 includes William Wightman (who appeared eleven times in the Lothian court between October and December 1546) together with Abercrombie, Kincragy and George Strang,[2] while Abercrombie and both Strangs appear there again in the 1550s. In 1547 the court of session chose as its advocate 'for the poor folks' (an annual appointment carrying a salary of £10)[3] one Master Andrew Blackstock who was a regular pleader in the official's court.[4] Finally, it would appear that the ubiquitous John Abercrombie might have appeared also at Stirling for a procurator of that name was constituted in the court of the Chapel Royal at Stirling in January 1548/9.[5] It may have been a coincidence of names, and Abercrombie was certainly in court in Edinburgh on that day,[6] but the presence of a procurator was not necessary in order for him to be appointed[7] and a general constitution of procurators might well include the name of one of the leading lawyers of the time.

Clearly the procurators of the official's court were not confined to a practice within the ecclesiastical jurisdiction, and

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1. E.g. ibid., p.120.
2. ADCP, p.584.
3. BP, ii, p.299. Cf. also, Hannay, College of Justice, pp.68-69.
4. He may not have been an altogether wise choice, for throughout 1547 he was involved in a long and vexatious action on his own account in the Lothian court during which it emerged that his wife was seeking a separation on the grounds of cruelty (Acta I, fo. 324v).
5. Chapel Royal Acta, fo. 1z.
6. Acta I, fo. 495v.
7. BP, ii, p.298.

the services of some of them were in demand in all the principal courts of Edinburgh. A practice in the church courts does not seem to have been any handicap to a lawyer's career and the rewards of success seem to have been, as now, substantial. We have very little information on the scale of fees payable for representation in the church courts in the 1540s, although normally they would probably have been on a daily basis similar to the system at Canterbury where the charges appear to have been sixpence a day.[1] Wealthier clients, however, may have preferred to retain the services of a procurator on a regular basis. This practice was not confined to procurators fiscal; the Abbey of Arbroath employed Master Robert Lesley to represent them in the civil courts for an annual pension of £10, and such arrangements were sufficiently common for Balfour to note that procurators had the right to sue for sums promised as pensions.[2] When John Abercrombie died in January 1574/5 the value of his inventory was assessed at £106, with a further sum of £1300 still owing to him.[3] The majority of his debtors were those who owed him arrears in annual pensions - there were eleven in all. Unfortunately, in five of these cases the inventory records only the total sum outstanding but in the remaining six the actual annual value of the pension is stated; they vary from the sum of £20 annually to the £4 for which George Crawford of Leifnoris was in arrears for each of the

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1. Woodcock, Canterbury, p.136.
2. BP, ii, p.300. The case quoted by Balfour may be found in Acta Sessionis (Stair), p.160.
3. SRO, Edinburgh Testaments, CC8/8/4, fos. 102-3.

preceding thirteen years. The six pensions together amounted to an annual total of £67 13s. 4d. and the five others can scarcely have amounted to much less; when payments for representation in specific suits is taken into consideration, together with the value of those pensions which were not in arrears at the time of his death, it becomes clear that Abercrombie was making, if not a fortune, at least a very solid living from his profession.[1] Not all procurators would have been in the same category. Thomas Weddel, who was scarcely less active in the courts than Abercrombie, did rather less well: when he died in 1567 his goods were worth only £10 and the commissaries waived the quot 'in respect of the poverty of the person'.[2] Weddel may have been an example of a lawyer who did not get on with the judge. On one occasion he was suspended 'from the office of procurator' on account of certain words he had directed against the official, Abraham Crichton; the suspension prevented him from taking on any further work although he was able to continue with those actions which had already been begun.[3]

There is no place here for a detailed study of the official's court procurators but some conclusions emerge from this brief discussion that are important to our understanding of the court itself.

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1. Cf. the inventory of John Spens of Condie, Queen's Advocate, who left in 1573 an estate totalling over £4000, including arrears of pensions (ibid., CC8/8/3, fos. 6-8, 385v-386r; CC8/8/6, fos. 54v-55r).
2. Ibid., CC/8/2. fo. 63v.
3. Acta I, fo. 217r. Cf. SES, ii, p.171 where there is provision for a judge to suspend a procurator for persistent misbehaviour.

The lawyers who practised there may have been of varying competence but they were not less important for the fact of their working in the ecclesiastical court. Their most distinguished colleagues, such as Kincragy or Abercrombie, were clearly among the leading practitioners of the law of their time, without distinction of where they practised, and Abercrombie at least foreshadows a future class of successful and prosperous lawyers. Their ability to transfer from one jurisdiction to another suggests that there was little to choose between the courts in terms of practice and procedure, and they would scarcely have expended so much time and effort in the court of the official if it was considered in any way a backwater or out-of-step with the main stream of legal activity.

(v) The Clerk of the Court and his Assistants

The records pay scant attention to the other members of the official's court but there was at least one post whose function was vital to the smooth operation of the court - that of the official's clerk. Some idea of the responsibilities of the clerk's office can be found in the terms of the appointment of John Lauder, Cardinal Betoun's secretary, to the post of clerk to the official principal.[1] As clerk and controller of the official's seal Lauder was responsible for the issue of every kind of document that the activities of the court might involve, from monitions to excommunications, from acts and contracts to citations and sentences; he was

1. St. A. Form., ii, pp.221-3.

responsible for the registration of all documents and proceedings of court, for the issue of transumpts and extracts, for the examination of witnesses and for the record of their evidence. From other sources we find that it was the clerk who called the cases in court[1] and who was responsible for collecting fines and charges imposed in court and for transmitting them to the cardinal's treasurer.[2]

The rewards for these services may have been substantial. Lauder's commission entitled him to his due share of the profits pertaining to the seal of the official with due allowance, as we have seen,[3] for the official's own share. There was clearly scope here for corruption, and a statute of 1549 sternly warns that clerks 'shall not exact from parties or procurators any sum under pretext of custom or corrupt practice previously obtaining that exceeds the old charges'.[4] Unfortunately the schedule of proper charges which was supposed to be appended to the statute has not survived and so it is not possible to obtain a clear picture of the financial dealings of the court, but some indications may be found in other sources. The sum transmitted to the treasurer in 1542 by the clerk of the official's court amounted to £109 11s. for the eight months prior to March 1541/2.[5] and this sum presumably represented the

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1. SES, ii, p.123.
2. Cf. St A. Rent., pp.120,135.
3. See above, 105-6
4. '[Statutum est] ne ultra taxam veterem a procuratoribus vel partibus exigant, praetextu cuiuscumque consuetudinis aut corruptelae hactenus obtentae' (SES, ii, p.124).
5. St A. Rent., p.120.

receipts of the court less the due share of the official and his clerk; the sum rendered in March 1542/3, this time for a twelve-month period, totalled £189 7s. 7d.[1] More specifically we find notes of sums due for particular services. In July 1553 someone anxious to obtain a copy of a process in order to pursue an appeal was admonished to pay ten shillings in part payment to Master Malcolm, clerk of the Lothian court, or to whomever should be clerk at the time.[2] In the court of Dunblane three people are found owing sums of money to the clerk; two of them owed five shillings, in one case specified as 'for sentence',[3] and the third was admonished to pay the clerk seven shillings and eightpence for 'note of sentence'.[4] It seems likely that the charges current in the officials' court did not differ greatly from those of the post-Reformation commissariat courts which succeeded them; there the sum of ten shillings was demanded for the extract of a decreet within a certain size, and twenty-one shillings if it was longer, while the 'sentence silver' on sums of twenty pounds or more was assessed at six shillings and eightpence.[5]

It is not clear how much of the actual court records were penned by the clerk himself. Even John Lauder, whose indefatigable

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1. Ibid., p.135.
2. Acta II, fo. 305r.
3. Dunblane Acta, fos. 33r, 179r.
4. Ibid., fo. 191v.
5. BP, ii, p.662. Cf. also the record of the expenses of two actions in the Canterbury courts (Woodcock, Canterbury, pp.136-7).

hand appears to have been responsible for the St Andrews Formulare and much of the Rentale,[1] must have required some assistance. His commission entitled him to appoint one or more 'sub-scribes and notaries' as often as he should be absent or as otherwise seemed necessary,[2] while in 1542/3 the Rentale records Master John Brown and Robert Brown as clerks-depute of the court of the official principal in St Andrews.[3] In the Dunblane court both William Blackwood and Robert Learmonth appear as 'scriba' on numerous occasions,[4] and the reference to the Lothian court in 1553 suggests that there too more than one clerk might take his turn at duty.

Only occasionally do the names or activities of other court officers appear in the records. This is partly because many of the external duties associated with processes in the officials' courts could be carried out by parish clergy; thus citations, monitory letters, inquiries and sentences of excommunication could be sent for execution to the appropriate local priest or chaplain. There were, however, some more permanent officers. Sir John Wilson, a chaplain, made frequent appearances either in order to inhibit the the official of Lothian from proceeding further in an action that had

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1. For details of John Lauder's career cf. St A. Form., i, pp.vii-viii; St A. Rent., liii-lv. A number of sentences are signed by a clerk 'G. Makesoun' (Sent. St A., fos. 239-249).
2. St A. Form., ii, p.222.
3. St A. Rent., p.135.
4. E.g. Dunblane Acta, fos. 77v.

been appealed,[1] or as 'executor of citatory letters' on such-and-such a person.[2] There was also a need for someone to carry the court's letters or instructions to the appropriate recipient and this seems to have been the function of an officer known as a 'bajulus'. On one occasion William Noteman 'bearer of a number of citatory letters' was cruelly mistreated when he attempted to deliver his letters to the curate of Borthwick for execution,[3] while another 'bajulus', Robert Denis, appeared in court shortly after this incident and testified to a similar misfortune in his own mission.[4] In Henryson's fable the 'apparitor' who carried the letters of citation was depicted as a cruel raven[5] and it may well have been the case that such court officers were as unpopular in Scotland as their counterparts seem to have been in England,[6] but in the absence of further information and in the light of their sorry experiences it is hard not to feel some sympathy for them.

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1. E.g. Acta I, fo. 6v. Cf. also below, 245.
2. E.g. ibid., fo. 9r.
3. Ibid., fo. 43v. The title 'bajulus' does not seem to imply any function other than that of an official bearer of letters - hence 'bajulus litterarum citatorium'. Execution of the letters seems to have been the responsibility of the recipient (cf. below, pp.199-200).
4. Acta I, fo. 55v. Cf. below, p.282-5.
5. See below, Appendix I, pp.333-4.
6. Woodcock, Canterbury, pp.48-49.

FIRST INSTANCE BUSINESS IN THE OFFICIALS' COURTS

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The development of such a highly organised court system from such simple origins leads us to consider the extent to which the ecclesiastical courts were able to meet the legal needs of the society of the day. While we should not perhaps look for a simple formula of supply and demand, an examination of the types of business conducted by these courts does suggest that the degree of inter-relationship between the supply of ecclesiastical justice on the one hand and the demands of the community on the other was very much greater than one might expect; it suggests, indeed, that by the mid-sixteenth century the legal needs of lay society had become a principal consideration of the church courts.

When Cosmo Innes introduced his selection of matrimonial sentences that were published by the Abbotsford Club in the 1840s,[1] he considered the question of how so great a part of human affairs had become subject to the jurisdiction of the church. He saw the cause as lying partly in the 'fluctuating and unsatisfactory nature of the lay judicatures' and partly in the high standards which had been attained in the ecclesiastical courts.[2] Both factors were

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1. See above, 29-30.
2. St A. Offic., ix.

certainly important but as answers they tend to beg the question. The church's claim to jurisdiction lay fundamentally in its self-appointed role in mediaeval society - the role that gave it its 'responsibility for faith and morals'.[1] Such a responsibility gave the church first of all its concern for discipline. We have already seen how the regular task of correction was not normally the concern of the official[2] but that matters of a moral nature could be, and frequently were, the cause of actions raised at the instance of individuals. Such business included the particular concerns of Cosmo Innes - actions of matrimony and espousal, legitimation and dowry - together with questions arising out of the church's duty to confirm testaments, appoint executors to those dying intestate and to provide for widows and children; other matters such as defamation or slander also fell into this category. Secondly, the church courts were concerned with the interests of the church and of churchmen. Many actions were raised to recover tithes or other ecclesiastical revenues, to settle disputes over benefices or parish clerkships, or to gain redress for wrongs done by laymen. In both these areas of jurisdiction the church might reasonably be supposed to have had a legitimate interest; but the third, and perhaps most interesting, category of business in the officials' courts was concerned almost entirely with secular affairs.

The most far-reaching effect of the church's responsibility for 'faith and morals' was that any transaction undertaken with the

1. G. Donaldson, 'The Church Courts', Scottish Legal History, p.363.
2. See above, 72.

support of an oath rendered all parties concerned liable to the church's jurisdiction in the event, or the alleged event, of non-fulfilment. The canonist and academic William Hay, lecturing at Aberdeen in the 1530s, explained the point thus: 'according to Augustine (De Verbis Domini) to swear means to take God to witness, either immediately in Himself, or mediately through his creatures'.[1] The use of 'creatures' to mean almost any aspect of God's creation[2] meant effectively that it was not possible to make a sworn promise without invoking God, and anyone who broke such a promise committed mortal sin 'because as far as in him lies he makes God a false and lying witness'.[3] The consequences of such a proposition would clearly be considerable. Moreover, there were many contracts and lesser agreements, often of a most trivial nature, which the parties concerned would have registered in one or other of the official records of the court as a greater guarantee of fulfilment.

We should beware of trying to make too precise distinctions between the various types of business carried on in the ecclesiastical courts - distinctions which a mediaeval official would in all probability not have recognised - but for convenience's sake the three general categories suggested above will be distinguished in our discussion. The term 'consistorial' will be used of those areas of jurisdiction where the competence of the ecclesiastical courts seems

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1. William Hay's Lectures on Marriage, ed. J.C. Barry (Stair Society, 1967), p.323.
2. Ibid., p.323.
3. Ibid., p.351.

to have been long-established - in the matters of matrimony and executry, of defamation and the care of the weak;[1] the term 'ecclesiastical' will be used of those matters relating to the clergy and to the property of the church, while the general areas of contract and the rendering of money will be termed 'contractual'. Under these general headings we may examine the first instance business of the officials' courts, that is to say the business that was being contested for the first time as opposed to appeals, which will be considered later,[2] and we can consider both the types of action that were raised and the relative incidence of each type.[3]

1. CONSISTORIAL BUSINESS

(i) Matrimonial

Of all the areas of sixteenth-century ecclesiastical jurisdiction in Scotland that relating to matrimony is the best documented. More than one hundred and thirty years ago Cosmo Innes published those sentences relating to matrimony and legitimacy that he could find in the Sentence Books of the Lothian and St Andrews courts, together with a lengthy and learned introduction; more recently the text of William Hay's extensive lectures on marriage

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1. Within this context it will be understood that this is the sole significance of the term.
2. See below, 241-259.
3. The results of a limited analysis of this kind may be found in Donaldson, 'Church Courts', p.366. Professor Donaldson based his figures on four sample batches of one hundred sentences each from the beginning and end of the two Sentence Books.

has been made available to us, and it provides as exhaustive an account of the sixteenth-century theory of matrimony in Scotland as it is possible to desire,[1] and both in the introduction to this volume and elsewhere[2] the evidence has been analysed in the light of modern scholarship. Although there is not a great deal that can be added to this wealth of detail concerning both practice and theory, it may be useful to summarise briefly the matrimonial problems that were most likely to be brought before the courts.

The word 'divorce' was used in the sixteenth century to convey both the modern 'separation' and 'annulment', and in explaining this point William Hay made it clear that annulment, or divorce from the bond of marriage, 'can never occur in a lawfully contracted and consummated marriage except by the natural death of one of the parties';[3] it was often difficult, however, to recognise precisely which contracts of marriage would be considered lawful. William Hay recognised three types of marriage, each of which depended to a varying degree on the principles of consent and consummation. The first, which he labelled 'incomplete' (initiatus), was simply a betrothal at which was made a declaration of intent to marry in the future - sponsalia per verba de futuro;[4] the second he termed 'valid' (ratum) and consisted of a declaration of consent to marry

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1. See above, 133n.
2. E.g. J.D. Scanlan, 'Husband and Wife', Scottish Legal History, pp.69-81.
3. Hay's Lectures, p.59.
4. Ibid., p.27.

at the present time - matrimonium per verba de presenti;[1] the third and most complete form of marriage depended on consummation, and sexual relations following a betrothal de futuro automatically converted it into a binding union.[2] Consummation was of particular importance: mere betrothal de futuro which was not subsequently followed by sexual relations could be declared void if one or other of the parties entered at a later date into a similar betrothal which was consummated.[3] A similar uncertainity seems to have affected the marriage de presenti even though, in theory at least,[4] it was held to be valid without consummation. The point was closely argued in one action in the Lothian court in which the plea of the defence rested on the fact that sexual relations had not been proved; the pursuer argued that since the consent had been given de presenti it was not necessary to prove consummation,[5] but after long deliberation the judge admitted the defence's plea to proof.[6] Consummation itself could not, however, be made the sole test of marriage as this would have raised great theological problems regarding the marriage of Mary and Joseph,[7] and hence the great emphasis that the church was

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1. Ibid., p.27; St A. Offic., xvi-xvii; Scanlan, 'Husband and Wife', p.72.
2. Hay's Lectures, p.29; St A. Offic., xvi; Scanlan, 'Husband and Wife', p.72.
3. E.g. Sent. Laud., fo. 54r.
4. 'Valid marriage is true marriage by words referring to the present, which can exist without subsequent copula. Thus carnal copula is not required for valid marriage since it is a true and valid marriage without it' (Hay's Lectures, p.27). However, Scanlan suggests that without consummation such marriages were capable of dissolution 'in certain exceptional circumstances', (Scanlan, 'Husband and Wife', p.71).
5. Acta I, fo. 115r, Wardlaw v. Wauchop.
6. Ibid., fo. 227v.
7. This problems seems to have much troubled the canonists; it is discussed at length in Hay's Lectures, pp.305-23.

obliged to place on observing the due forms of consent.[1] Nevertheless it is likely that the validity of marriages was often a subject of confusion among ordinary people and especially among those who were uneducated or who lacked effective pastoral guidance.

The form of the marriage was only part of the problem; equally vexatious were the limitations placed by the canon law on whom exactly any individual could lawfully marry. The church forbade marriage between two persons who were related in anything up to the fourth degree of consangunity,[3] which meant effectively that marriage was impossible between a couple having just one great-great-grandfather in common.[4] The complaint of Archbishop Hamilton to the pope in 1554 that it was scarcely possible for two people of good family to marry outwith the forbidden degrees is well known,[5] and although papal dispensations to marry within these degrees were available the procedure could be costly and time-consuming. Nor were these restrictions confined to blood relations because the concept of 'affinity' extended the degrees of prohibition through the sexual act to the relations of

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1. Cf. the statute forbidding clandestine marriage (SES, ii, pp.134-5).
2. The problems arising out of a clandestine or improperly constituted marriage are discussed in Hay's Lectures, p.31.
3. The ban had once extended to the seventh degree but had been relaxed by the fourth Lateran Council in 1215 (Hay's Lectures, p.193).
4. Such a relationship was enough to annul the marriage of Queen Margaret and Lord Methven, June x July 1537 (Sent. Laud., fo. 265r). The rules of consanguinity and affinity are set out in tables in St A. Offic., xxiv, and Hay's Lectures, pp.240-41.
5. Hay's Lectures, xliii.

the other partner, regardless of whether or not they were married.[1] Thus a casual sexual relationship for ever barred the man from future marriage with any relations of the woman to the same degree as if they were his own kin.[2] There were many other impediments to marriage,[3] while other factors such as cruelty or adultery could lead to a judicial separation,[4] but the great majority of actions for divorce recorded by Cosmo Innes were founded on the impediment of the forbidden degrees of affinity and consanguinity.[5]

This raises an interesting point of comparison with English evidence. At one time it was axiomatic that the canonical rules on consanguinity and affinity were an easy and much abused means to an annulment, but more recently this theory has been called into question. R.H. Helmholz admits that 'it is all but irresistible to conclude that divorces were often procured under the system of kinship qualification', but he insists that 'the church court records do not support that conclusion'.[6] Houlbrooke agrees with this stand and from his own studies has added that 'no annulments on the ground of consanguinity have been discovered in Norwich or Winchester records. At Norwich four marriages were held void on the ground of an impediment

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1. Scanlan, 'Husband and Wife', pp.79-80.
2. E.g. Sent. St A., fo. 34v. There are many examples of this relationship.
3. Cf. Scanlan, 'Husband and Wife', pp.74-81.
4. That is, divorcium a mensa thoro et mutua cohabitatione (e.g. Sent. St A., fo. 84v).
5. Of the 170 sentences printed by Innes which relate to matrimony less than 150 actually involved annulment or separation; thirty of these were founded on consanguinity and sixty-two on affinity (an analytical digest of the sentences appears in St A. Offic., liii-lv).
6. R.H. Helmholz, Marriage Litigation in Mediaval England (Cambridge, 1974), p.79.

of affinity.[1] This is in stark contrast to the Scottish evidence. Helmholz suggests that the reason for the absence of these types of case (in English records) lies partly in the difficulty that must have attended any attempt to prove the kinship in court and partly in the natural reluctance of people to commit themselves to a marriage which was, or might be, consanguineous.[2] It is difficult to see why such considerations should not also have applied in Scotland. It is possible that the rules on the production of proof were less strictly applied in Scottish courts but there is no evidence that the officials were less conscientious in matrimonial matters than they were normally; it is possible also that the English were less bothered by such marriages once they had been undertaken than were the Scots. The evidence of defamation cases shows how important was public reputation in moral matters to an individual in the sixteenth century, and there is no reason to believe that the suspicion of fornication and bastardy which a dubious marriage entailed would have been borne with equanimity. It would have been an essential function of the courts to resolve such doubts to the satisfaction of the community, by annulment if necessary.[3]

The question of kinship lay at the heart of many of the matrimonial sentences surviving from the officials' courts, but Innes's concentration on this subject should not mislead us as to the

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1. Houlbrooke, Church Courts and People, p.75.
2. Helmholz, Marriage Litigation, pp.79-85.
3. See below, p.327.

true extent of matrimonial business as a proportion of the business of the courts as a whole.[1] During the twelve years between 1541 and 1553 that are covered by the principal's Sentence Book only fifty-five matrimonial actions of all kinds came to sentence - about fourteen per cent of the total number of sentences in first instance cases. In the Lothian court the last twelve years of the Sentence Book cover the period between 1539 and 1551, during which time there were only twenty-four matrimonial sentences, or slightly more than six per cent of the total for those years. As with all types of case in the ecclesiastical courts the number of matrimonial actions that actually came to sentence may have been only a small minority of those that were originally undertaken - two matrimonial actions were begun in October-December 1546, for example, and neither came to sentence;[2] but it does seem likely that in cases where the validity of a marriage was in question the courts would make a particular effort to contrive a settlement.

(ii) Executry

By contrast with the comparatively small proportion of matrimonial cases actions involving testaments and executors constitute the largest overall group. For the same twelve-year period executry actions accounted for eighty-two sentences in the court of the official

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1. For example, Innes's selection has prompted the following: 'at the close of the Roman obedience in Scotland, the time of the Bishops' Courts seems to have been very largely taken up with matrimonial and kindred causes' (I.M. Clark, A History of Church Discipline in Scotland [Aberdeen, 1929], p.49).
2. Acta I, fo. 40r, Garland v. Boys; fo. 6v, Wardlaw v. Wauchop.

principal (that is, a little more than twenty-one per cent of first instance business) and for one hundred and ten sentences in the court of the official of Lothian (or about twenty-nine per cent of the total). The relationship of the ecclesiastical courts to the regulation of testamentary affairs has been examined in detail by Professor Anton, and with particular reference to sentence material,[1] but it has an especial significance to this study in that it illustrates the dual nature of much of the court's responsibilities - for administration as much as for adjudication.

We have already seen how the testamentary duties of the ordinary had been reaffirmed at Perth in 1420.[2] The bishop was required to confirm all testaments, appoint executors to those dying intestate, and to oversee the activities of all executors, holding them to account at the conclusion of their administration.[3] In practice the duty of appointing executors dative (that is, executors to those who had died intestate or whose 'executors testamentary' nominated in the will had declined to act)[4] fell to the official. A statute of 1559 required that no such appointments should be made unless a public notice to that effect, summoning all interested parties, had been published at least fifteen days earlier;[5] this seems to have

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1. Anton, 'Mediaval Scottish Executors', pp.129-54.
2. See above, 56.
3. SES, ii, pp.77-78.
4. Executors dative could also be appointed when only part of the goods of the deceased were covered by his testament, but the appointment applied only to the intestate goods (cf. below, 142n).
5. SES, ii, p.167.

reinforced the established practice of the official's court. The offical of Lothian made twelve such appointments between October and December 1546; each is recorded as having followed a written citation or edict summoning all interested parties to attend the appointment of executors dative.[1] Both the issue of the edict and the confirmation of the executors dative in their post was done in the name of the ordinary,[2] but the task of choosing the executors fell generally to the official or his commissaries.[3] It would seem that the choice usually fell on the nearest relations[4] as, for example, in the case of Andrew White 'there appeared Mariot White, sole natural and legitimate daughter of the late Andrew, who petitioned as his nearest blood relation to be confirmed as executor dative to his estate', and as no one else appeared to make a claim this was granted.[5] There was no objection to the appointment of women as executors, and indeed widows are found as executors more frequently than any other relative,[6] nor was illegitimacy any obstacle,[7]

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1. E.g. 'eodem litteratorie citatis omnibus et singulis interesse habentibus' (Acta I, fo. 2r).
2. Thus on 23 October 1546 the testamentary executors of the late William Sineberd were summoned to be appointed executors dative to goods outwith the testament, and to be 'decerni, dari et ordinarie auctoritate per dominos vicarios generales Sancti Andree vigore ipsorum officii confirmari alioquin ad allegandum causam etc. prout in edicto dominorum vicariorum continetur' (ibid., fo.6r).
3. Although one such appointment was made by John Wynram, vicar general of St Andrews, in the Lothian court in October 1546 (ibid., fo. 1r).
4. Cf. Anton, 'Mediaeval Scottish Executors', p.136.
5. 'Statim comparuit Mariota Quhite filia naturalis unice et legittima dicti quondam Andree et peciit se tamque propinciorem de sanguine ejusdem in executricem dativam ad premissa decerni, dari et confirmari' (Acta I, fo. 2r).
6. The sentences provide numerous examples of this - e.g. Margaret Gardin, widow and executor of William Auchterlony of Kelly (Sent. St A., fos., 12r-13v).
7. Thus the executors of the estate of John Walderstone were named as his sister Katherine and his 'bastard brother' John (Acta I, fo. 5r).

nor even, apparently, age; one action was brought in the principal's court by one Alexander Lesley, executor to Andrew Lesley, and by Alexander's tutor George Henderson[1] - and tutors were only appointed to boys under fourteen.[2] The proceedings were more than a formality; the citation and the court hearing made it possible for objections to be lodged to the proposed appointment - it might be alleged, for example, that the deceased had died testate and had nominated executors testamentary;[3] in such a case a diet might be assigned to prove or disprove the allegations, thus initiating a regular court action.

The church's responsibilities did not end with the appointment of executors. Testamentary executors were expected to draw up an inventory of the goods of the deceased within nine days of death[4] and to present them to the proper authorities for confirmation.[5] It seems likely that in the case of executors dative a similar period would have been allowed following their date of appointment. In the case of executors testamentary it was possible for them to renounce

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1. Sent. St A., fo. 51z.
2. See below, 147.
3. This was the objection to the appointment of Walter Cant as executor dative to his father. It was alleged by a nephew that the deceased had in fact died testate and had appointed him as executor testamentary (Acta I, fo. 13r).
4. SES, i, cclxxxvii-cclxxxviii.
5. The declaration of 1420 (cf. above, 141) directed that the moveable goods of the deceased should be divided into three parts: one for the use of the widow, one for the use of the children, and the remaining third as the 'dead's part'. Where the dead's part exceeded £40 in value the confirmation of the testament was the duty of the ordinary; those under £40 were the responsibility of the deans of Christianity (SES, ii, pp.77-78).

their office within the period allowed for producing the testament for confirmation;[1] it was also possible, if there was any reasonable doubt about the appointment of the executors testamentary, to bring an action to have executors dative nominated in their place.[2] Once the testament had been confirmed the executors were allowed the period of one year in which to settle the affairs of the estate, during which time they were liable primo loco for all debt.[3] They were liable also for the fulfilment of any contract which might have been binding on the deceased; in such cases the other contracting party would bring an action to have the contract transferred to the executors.[4] At the end of the year the executor had to render his account to show that the terms of the testament had been faithfully observed and that all debts had been satisfied, offering such evidence or witnesses as might be necessary. He could then be discharged from any further obligation by the official or commissary.[5]

The ecclesiastical courts thus played an important part in the regulation of testamentary affairs; but the great bulk of executry material in the sentences relates not to administration but to the litigation in which executors became involved. The principle that

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1. Cf. Acta I, fo. 22r, for an example of executors making such a renunciation.
2. Sent. St A., fo. 244v.
3. Anton, 'Mediaeval Scottish Executors', p.142.
4. E.g. Acta I, fo. 14v, Pot and Paterson v Ker. Cf. also Anton, 'Mediaeval Scottish Executors', p.143.
5. The testaments were frequently recorded in detail in the court books. Thus the exoneration of James Strachauchin, executor of Gilbert Strachauchin his predecessor as rector of Fettercairn, included proof of payment of such diverse sums as £20 owed for the building of the Northwater bridge and £3 for the expenses of a scholar at St Andrews (Sent. St A., fos. 69v-70r).

testamentary actions belonged to the church (at least, insofar as moveables were concerned) seems to have been established at an early date.[1] Either an executor or a creditor might have recourse to legal action depending on whether debts were owed to or by the deceased. It is not clear whether the ecclesiastical judge was alone competent in such actions, as Balfour declares,[2] or whether the executor at least had the right to pursue before any judge, which is what the evidence of the St Andrews Formulare seems to suggest,[3] but these cases certainly took up a considerable amount of the official's time. The majority of such actions were raised by creditors against executors and differ little in principle for straightforward actions for debt.[4] The cause of the action could vary from a simple money debt such as that 'which the late Agnes had, before her death, faithfully promised to pay to the petitioner'[5] to a legacy such as the 'cloak of Paris black worth four pounds, which was left to the petitioner by the said late John';[6] another cause might be the claim for the 'bairn's part', the third of a father's estate due to a child.[7]

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1. 'Placitum de dotibus et de testamentis ad forum ecclesiasticum pertinet' (Regiam Majestatem and Quoniam Attachiamenta, ed. Lord Cooper [Stair Society, 1947], p.60).
2. BP, i, p.29.
3. E.g. 'coram quibuscumque dominis judicibus ecclesiasticis vel secularibus' (St A. Form., i, p.75).
4. Cf. below, 174-7. A total of sixty of the eighty-two sentences in the principal's court involved testamentary debts.
5. Acta I, fo. 33v, Henderson v Thomson.
6. Ibid., fo. 26r, Witherspoon v Chalmer.
7. E.g. Sent. St A., fo. 168v.

Actions such as these could clearly lead to considerable delays in the settlement of a testament but they were a vital part of the church's duty to see to the just administration of estates. Their presence in such large numbers in the court records is also an indication of the position of the officials' courts relative to that of the courts spiritual in England. Although such cases had frequently been decided by the English church courts in the fifteenth century, the numbers declined rapidly in the sixteenth. Houlbrooke has noted that hardly any such actions were heard at either Winchester or Norwich after 1520 and he attributes this, at least in part, to 'the increasingly hostile attitude of the common lawyers'.[1] In Scotland the church courts faced no such competition, and they continued to deal with cases of testamentary debts unabated into the 1550s.

(iii) Legal Guardians

Similar to the official's duty of appointing executors dative was his responsibility for providing curators at law (curatores ad lites et negocia) for children who had not yet reached their majority and who had affairs that required administration or litigation. There were a number of relevant legal ages in the sixteenth century but the principal division was into three parts - pupillarity, minority and majority.[2] For girls the age of minority began at twelve

1. Houlbrooke, Church Courts and People, p.102.
2. Cf. G.A. Montgomery, 'Guardian and Ward', Scottish Legal History, p.126.

and ended at fourteen, at which age they could enter into ward lands; for boys minority began at fourteen and ended when majority or the 'perfect age' was achieved at twenty-one.[1] A later 'perfect age' of twenty-five was recognised by the canon law but this anomaly was removed when ecclesiastical practice was brought into line with the civil law in 1559.[2] During pupillarity a child could be provided with a tutor, either by virtue of the father's will (tutor testamentary), by brieve of tutory (tutor at law) or by appointment on application to the exchequer (tutor dative).[3] The tutor would probably be the child's nearest relation over twenty-five years old, if one such existed.[4] Although the official did not choose tutors he was clearly competent to confirm such appointments (at least so far as tutors testamentary were concerned) when they were in dispute; thus an attempt by one tutor testamentary to be confirmed as sole tutor to the exclusion of the testator's widow was rejected by the official principal in January 1550/1.[5] The relevant age limits were also strictly enforced. When a tutor testamentary brought an action against his pupil who was clearly attempting to manage his own affairs with the assistance of a curator, the official declared that since the boy had achieved only his thirteenth year he had not yet passed out of the care of his tutor in whose 'governance and tutelage' he should remain until his fourteenth year.[6] In general, however, it may be assumed that such relationships were not so contentious, and on occasion both tutor and pupil are found together pursuing a common end in the official's court.[7]

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1. BP, i, p.227. A boy could, however, marry or become a burgess at the age of fourteen while a girl could marry at twelve.
2. SES, ii, p.172.
3. BP, i, pp.114-15.
4. Cf. St A. Form., ii, p.324.
5. Sent. St A., fo. 232r.
6. 'Sub gubernantia et tutela' (ibid., fo. 261v).
7. E.g. ibid., fos. 51r, 116r.

On reaching the age of minority the child's care was entrusted to a curator. The choice of curator was up to the child himself, but without one he was unable to pursue an action in the courts,[1] and once such an appointment was made it would last until the minor, whether boy or girl, reached the age of twenty-one.[2] Curators could be appointed by any competent judge[3] though preference would normally be given to the judge in whose court it was intended to litigate; appointments could also be made in more than one court.[4] In the Lothian court such appointments were a regular feature of its administrative business during the whole of the period covered by Acta I, and eight requests for curators were dealt with by Abraham Crichton between October and December 1546.[5] The usual form of appointment was brief and consisted of the minor's request that one or more persons should be appointed as his curator ad lites et negocia; this would then be conceded by the judge and the new curator would take an oath de fideli administratione.[6] The appointment of a curator in the official's court was generally a prelude to legal action and might be followed by the constitution of procurators[7] or by the immediate proposition of a libel or petition.[8]

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1. BP, i, p.120.
2. Ibid., i, p.125.
3. Ibid., i, p.121.
4. See below, 151n.
5. Acta I, fos. 2v, 11r, 13r, 21v (twice), 22v, 31v, 32r.
6. E.g. ibid., fo. 11r.
7. E.g. ibid., fo. 21v.
8. E.g. ibid., fo. 22v.

Such arrangements did not necessarily mean that the child was an orphan; a father could himself be appointed his child's curator[1] or he could consent to the appointment of someone else to that responsibility.[2] In the latter case it may have been because the father was in some way prevented from acting himself or because the matter in hand concerned a transaction between father and child, in which case the father could not act as curator *in rem suam*.[3]

There seem to have been no strict criteria regulating the choice of curators. In June 1555 'because it is understand, that by the geving of curatouris to minoris be sindrie Jugeis, thair hes bene greit skaith sustenit be the saidis minoris', it was enacted by parliament that before such appointments were made in the future two at least of the minor's most prominent kin were to be cited at nine days notice to attend the proceedings.[4] The procedure envisaged by parliament would clearly have been very similar to that which already attended the appointment of executors dative. It is not clear whether their recommendations were aimed solely at the central courts or whether they were to apply to all courts that exercised the right to appoint such curators, but certainly in the official's court in the 1540s the appointment of curators was attended by none of the formalities of citation that were a necessary prelude to the appointment of executors.

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1. E.g. *ibid.*, fo. 2v.
2. E.g. *ibid.*, fo. 31v. Following a father's death a child could revoke the curators which the parent had appointed (*ibid.*, fo. 43r).
3. *BP*, i, p.124.
4. *APS*, ii, p.495.

A wide variety of people are found acting as curators; there appears to have been no objection to clerics assuming the responsibility[1] nor, indeed, to members of the court, since a procurator,[2] a procurator fiscal[3] and even Abraham Crichton himself[4] are all found in this role. Women, however, do not appear to have been eligible for this office. No woman has yet been found to have been appointed curatrix in the Lothian court and it may well be that the rules on this matter followed those in the lay courts where a mother could be curatrix ad negocia to her child but not ad lites (that is to say, her authority did not extend to litigation);[5] but two entries in Acta I referring to petitions brought by a woman 'with the consent of her mother' do suggest some kind of maternal responsibility at law.[6] Under certain circumstances it would seem that the official could take the initiative in the appointment of curators. This was done on one occasion by Abraham Crichton ex officio to a girl who was described as a pupilla and so was presumably still under twelve;[7] no reason was given for this but Balfour notes that a curator could be appointed to one who was still a pupil if the tutor had in some way proved unsatisfactory.[8]

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1. E.g Sir Andrew Hay (Sent. St A., fo. 231r), Sir John Ker (Acta I, fo 21v).
2. Thomas Weddel (Acta I, fo. 373r).
3. William Arthour, procurator fiscal in the archdeaconry of St Andrews (Sent. St A., fo. 260r).
4. W. Fraser, The Stirlings of Keir, (Edinburgh, 1858), pp.365-7.
5. BP, i, p.122.
6. Acta I, fo. 28v, Thomson v Cass, Thomson v Cranston.
7. Ibid., fo. 13r.
8. BP, i, p.118.

The act of 1555 also provided that curators, once appointed, could not be dismissed except by the judge who had made the appointment and then only for 'reasonable causes'.[1] It is not clear what causes were to be deemed 'reasonable', but certainly in the 1540s the repudiation of curators by the minors concerned was a not infrequent occurrence in the Lothian court. On these occasions the repudiation does not seem to have been confined to those curators appointed in the court alone; when George Barron revoked his curators on 19 January 1547/8, he included those appointed 'both in the present court and before the provost and bailies of this city of Edinburgh'.[2] The repudiation of a curator could include the repudiation of all that he had done in that office;[3] on the other hand, it could be done with the curator's express consent;[4] whatever the circumstances, though, there was usually a simultaneous request for the appointment of new curators.[5] There were always some limitations on the accountability of minors. The four years following a man's twenty-first birthday were known as the quadriennium utile and during this time the acts of his minority could be revoked - a custom that the Scottish crown found particularly useful.[6] So far

1. BP, i, p.122.
2. 'Eodem die Georgius Barron revocavit omnes et singulos curatores sibi constitutos et datos tam in presenti auditorio quam coram preposito et baillivis presentis burgi de Edinburgh' (Acta I, fo. 274v).
3. Ibid., fo. 366r. On one occasion a youth of twenty years was released from his oath of obedience to his curator as a preliminary to bringing an action against him for wrongful alienation (Sent. St A., fos. 249r-250r).
4. Acta I, fo. 258r.
5. E.g. ibid., fo. 75v.
6. Cf. BP, i, xliii; SES, ii, p.307.

as the private citizen was concerned it was a period in which he could appear before a judge and make a judicial revocation of all acts done to his prejudice both by himself and by his curators during his minority.[1]

The principle of curatorship was not only confined to children. According to Balfour the duty of a curator of a girl was automatically ended if she should marry, but only because the husband took on the role 'for his interesse'.[2] A married woman was normally unable to pursue a legal action without the consent of her husband nor could she be pursued unless the husband was pursued also,[3] and hence we find the common entry in the records of a woman involved in a dispute together with her husband 'pro suo interesse'.[4] Women were not, however, excluded from taking legal action in the official's court on their own behalf; although they appear most frequently with a husband 'pro suo interesse', there are many examples of actions where a woman was either sole pursuer or defender.[5] This would most obviously have been the case in actions for divorce and separation, but the preference for widows

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1. E.g. the revocation made on 29 October 1529 before a commissary of the official of Glasgow (SRO, Crawford Priory Collection, GD20/1/417) and cf. Fife Court Book, p.342.
2. BP, i, p.125. This curatorship was not abolished until 1920 (cf. G.C.H. Paton, 'Husband and Wife', Scottish Legal History, p.100).
3. BP, i, p.93.
4. E.g. Sent. St A., fo. 15r; Acta I, fo. 1r.
5. For example (excluding actions for divorce and separation) women appear as unaided pursuers and defenders in forty-six of the first instance sentences in the principal's book.

in the role of executor[1] led to their frequent appearance in executry actions. On the rare occasions when a married woman appeared without her husband the fact was carefully recorded. When Mariot Fleming made judicial recognition of her son's charter, to which her own seal had been appended, she was recorded as appearing 'outwith the presence of her husband John' and she was obliged to take an oath that she had appeared without compulsion, coercion or by any 'sinister machination'.[2]

(iv) Defamation

One field in which it would seem that sixteenth-century women were particularly prominent, however, was in the slander of their neighbours. In matters of defamation the officials came closest to an exercise of correctional jurisdiction but with the one distinction that such actions were still brought at the instance of parties (ad instantiam partium) and were not promoted by the judge ex officio. In a number of these cases the actual words at issue were recorded, no doubt in order to enliven the clerk's duties, and it is not difficult to understand why the injured party had gone to the trouble and expense of legal action. Public reputation was of considerable legal significance and it was enough for an individual to be a subject of notoriety or public scandal for the church to take action.[3] All the slanderous charges recorded would have rendered

1. See above, 142.
2. Acta I, fo. 37r.
3. As early as the fourteenth century the parish clergy were required to bring to their annual assembly the names of those meriting disciplinary action in their parishes and of those 'que sunt notoria vel de quibus fama publica laborat' (SES, ii, p.70).

the victim, even on suspicion, liable to disciplinary action by the church at least, if not to prosecution by the state. The accusations were almost always of a sexual nature, although theft and reset also occur.[1] Most common was the charge of being a 'priest's whore',[2] with 'priest's yaud' (jade) as one variation,[3] while the charge of 'swiffing' with an official has already been noted.[4] The charges were often of a precision and a virulence that could not easily be ignored, especially when they had been uttered in public. One such example was recorded thus:

> 'Vile priest's whore and spouse breaker that you are! You had John Wallace all night with you Sunday; you took him over the water on St James's day and lay with him there and brought him home again. Vile, common whore and thief that you are!'[5]

On another occasion a chaplain denounced a man as 'thief, heretic and smaik' (villain).[6] The public nature of such outbursts was important and was often reflected in the imposition of a penance to be performed in the street or house where it had taken place.

There appear to have been two schools of thought among judges when it came to dealing with these cases. Abraham Crichton's

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1. E.g. Sent. St A., fo. 283v; Sent. Laud., fo. 342v.
2. E.g. Sent. St A., fo. 184v; Sent. Laud., fos. 333r, 335r, 338v. This particular accusation knew no frontiers: at Winchester and Norwich it was 'the most popular single term of abuse' (Houlbrooke, Church Courts and People, p.81), and it was popular in London also (R.M. Wunderli, Ecclesiastical Courts in Pre-Reformation London, [University Microfilms International, 1979], p.200).
3. E.g. Acta I, fo. 2r, Ewing and Wilson v Brown and Child.
4. See above, 107.
5. Sent. Laud., fo. 333r.
6. Sent. St A., fo. 161r.

predecessor as official of Lothian, John Weddel,[1] seems to have favoured imposing a stiff sum of money in compensation, a sum which was usually set at forty shillings or at five merks, but which could be as low as twenty shillings.[2] Crichton, however, seems to have taken a more moral approach (or it may have been that the financial incentive led to frivolous claims for compensation) and following his appointment in 1540 the monetary penalty was replaced by a public penance, either in church at the time of mass or in the place where the slander had been committed, together with the gift to the church of a candle of specified weight.[3] Penance seems also to have been the favoured penalty for slander in the official principal's court,[4] but there may have been a reluctance to inflict such public humiliation on a cleric since the slanderous chaplain referred to above was ordered to pay a swingeing twenty pounds in compensation instead.

It is perhaps a natural reflection of the larger population and the more urbanised community with which the Lothian court had to deal that the number of actions for defamation (cause injuriarum) heard there was very much greater than the number in the court at St Andrews. During the twelve years between 1539 and 1551 the officials of Lothian passed sentence on twenty-seven cases of defamation whereas only five such sentences were recorded in the principal's court

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1. See above, 103n.
2. Sent. Laud., fos. 286r,294r,294v,296v; 288v,293v,294r,296r; 292v.
3. E.g. ibid., fo. 340r.
4. E.g. Sent. St A., fos. 127v,184v,283v.

between 1541 and 1553.[1] Even in Lothian, however, the proportion of cases of defamation was small and only one such case was initiated in the court between October and December 1546, and that never came to sentence.[2]

2. ECCLESIASTICAL BUSINESS

(i) Teinds

The efforts of the ecclesiastical courts to enforce the payment of goods and moneys due to the church were probably the most contentious of their many functions. It is not the intention at this point to discuss such litigation in its social context but rather to consider its place as part of the business of the officials' courts. We might perhaps expect this to be a big part, if we are to believe John Knox when he wrote that 'the clergy preach not trewlie and sincerelie, but thair landis, rentis, and pompous prelacies, is all thai cair for, and set rakenyng of'.[3] Some justification for this charge may be found in the records. In the court of the official principal at least actions relating to ecclesiastical incomes form the largest single group of sentences between 1541 and 1553 - a total of ninety-eight, which is equivalent to almost twenty-six per cent of the sentences. In the Lothian court, however, the proportion drops considerably and between 1539 and 1551 there were

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1. This represents about 7% of sentences in the Lothian court and about 1% of first instance sentences in the principal's court. It is interesting to note that defamation suits were 'the most numerous type of case' at Canterbury in the 1520s, although by that time other church court business was in steep decline (Woodcock, Canterbury, pp.88,84).
2. Acta I, fo. 2r, Ewing and Wilson v Brown and Child.
3. Knox, Works, iv, p.128.

only forty-one such sentences - that is, about eleven per cent.

These figures require some analysis. The majority of the ninety-eight sentences in the principal's court were for the recovery of teinds[1] and were brought by religious institutions, individual rectors and by those who held teinds in tack - or 'farmers' (firmarii).[2] Slightly more than a third of these actions were brought by religious houses and other 'spiritual corporations' of the church,[3] amongst which the priory of St Andrews and the abbey of Arbroath (of which Cardinal Betoun was commendator) were particularly prominent,[4] but which included also the houses of Coupar, Monymusk, Balmerino, Pittenweem, Loch Leven and Scotlandwell,[5] together with the Friars Preacher and St Leonard's College.[6] Religious houses were also active litigants in the Lothian court where actions were brought by Holyrood, Sciennes, Newbattle, Dunfermline, Haddington, Pluscarden, Dundrennan and Eccles amongst others.[7] The extent to which the payment of teinds had been

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1. Sixty-seven sentences.
2. That is, they payed a fixed sum annually in exchange for the right to gather the teinds of a specified area. The tack (assedatio) was distinguished from the feu in that it was not hereditary.
3. I.e. twenty-six sentences. It has been estimated that by the time of the Reformation the teinds of about eighty-six per cent of Scotland's parish churches had been diverted away from the parish - principally to the big religious institutions (I.B. Cowan, 'Some Aspects of the Appropriation of Parish Churches in Mediaeval Scotland', RSCHS, xiii [1959], p.205).
4. E.g. Sent. St A., fos. 122v, 123v, 125r and 50v, 51v, 137v, respectively.
5. Ibid., fos. 219v, 198v, 153r, 72, 181v, 48r.
6. Ibid., fos. 230v, 124v.
7. Acta I, fos. 3v, 2r, 10v; Sent. Laud., fos. 349r, 341v, 341r; (by appeal) Sent. St A., fos. 23v, 35r. St Andrews Priory is also found litigating in the Lothian court (e.g. Acta I, fo. 2r).

dissociated from the parish church is further illustrated by the remaining teind actions of which only ten appear to have been brought by the rectors of the parishes concerned, the remainder being claimed by the holders of tacks.

The lease of teinds on tack was, in theory, a method both of ensuring a steady income to the church and of relieving it of the trouble of gathering the fruits itself. These tacks were themselves sometimes the subject of disputes. The tack was generally for a limited period in order to provide for an increase in the rent in the event of inflation (a period of nineteen years was often specified)[1] and would contain a clause whereby the tack could be annulled in the event of non-payment by the tacksman.[2] The fact of non-payment was thus enough for the official principal to annul the nineteen-year tack held by Robert Maule of Panmure from the abbey of Arbroath in 1543.[3] The rules seem to have been strictly enforced, at least by Cardinal Betoun. The tack of Abernethy was leased for a period of nineteen years to Peter Carmichael and his wife Eufemia Wemyss by the abbey of Arbroath in 1525 and was renewed again in 1528 and 1533;[4] when Carmichael died the tack remained vested in his wife[5] Eufemia who was apparently unable to pay off fully the annual rent. Her payment for the crop of 1542 was recorded[6] but she was short by ten pounds 'for which she shall answer to the cardinal'.[7] Her answer was clearly not satisfactory as

1. E.g. St A. Form., ii, p.228.
2. E.g. ibid., p.229.
3. Sent. St A., fo. 51v.
4. Arbroath Liber, ii, pp.449,479,514.
5. Cf. St A. Form., ii, p.228. Carmichael's testament was confirmed in 1541 (St A. Rent., p.119).
6. St. A. Rent., p.166.
7. Ibid., p.170.

the official principal annulled her tack on 18 August 1543.[1] It was also an important feature of the tack that it should not remain valid after the death of the tacksman or of his widow, so that the lease should not become hereditary, and a clause would be inserted to this effect.[2] Litigation was not confined to the annulment of tacks; it was also possible for the tacksman to pursue the grantor if, as once in the case of the Abbot of Inchcolm,[3] he did not keep to his side of the bargain. Nor were tacks restricted to lay 'farmers', for almost as many actions were brought by clerics who held the tack of the teinds of another parish.[4]

Actions for the recovery of teinds (or against their 'unjust intromission') were usually brought against more than one defender, often against a large number of parishioners at once,[5] and could be for the crop of that year[6] or of several previous years.[7] It was generally the garbal teinds[8] that were at issue, although actions were also undertaken for the teinds of fish[9] and of a

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1. Sent. St A., fo. 50v.
2. E.g. ibid., fos. 50v, 51v; St A. Form., ii, p.228.
3. Ibid., fo. 150r.
4. E.g. Peter Sandelands, rector of Calder, who held the tacks of the teinds of Kinghorn (ibid., fo.101r) and of Calder-Clere (Sent. Laud fo. 315r). There were fourteen sentences in favour of clerical tacksmen and eighteen in favour of laymen.
5. E.g. St Andrews Priory v Lord Seton and twenty-eight colleagues (Acta I, fo. 2r).
6. E.g. ibid., fos. 2v, St Andrews Priory v Lord Seton; 3v, Holyrood Abbey v Douglas of Longniddry; 5r, Newbattle Abbey v Ramsay of Dalhousie.
7. E.g. Sent. St A., fo. 70v.
8. Or 'great teinds' (cf. Dowden, Mediaeval Church, pp.162-3).
9. E.g. Sent. St A., fo. 74r; Acta I, fo. 67r, Crichton v Scott and Kemp.

doocot.[1] The records of the court list the teinds in great detail, giving both the quantity of the crop and its current price, and these entries are among the longest in both Act and Sentence Books.[2] There was probably never a time when the church was able to gather its teinds without difficulty. As early as the twelfth century King Malcolm issued a warning that all teinds should be paid in full on pain of being fined by the sheriff,[3] while a thirteenth-century statute included the witholders of teinds in its form of general excommunication.[4] By the sixteenth century the problem was clearly much worse and while the church was able to a certain extent to side-step the task of gathering the teinds by the grant of tacks, this only transferred the problem of collection, it did not solve it.

The institution, rector or tacksman faced with difficulty in recovering his teinds could bring a petition for their payment in the official's court,[5] but a suit was not necessarily his own recourse. Application could be made to the ordinary, or to whoever exercised ordinary jurisdiction, for the decreet of letters monitorial

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1. Acta I, fo. 7r. Bishop Dowden would have been interested in this example. 'I have been surprised not to find pigeons expressly mentioned in the Scottish statutes. In England they were titheable. And, though not expressly named, there is no reason to suppose that in Scotland they were exempt' (Dowden, Mediaeval Church, p.167).
2. E.g. Hugh Douglas of Longniddry was pursued for 'tres celdras frumenti precium bolle cum pabulo xl solidos; tres celdras ordei precium bolle cum pabulo xxxvi solidos; septem celdras avenarum precium bolle cum pabulo xxiiii solidos' - a total value of about £330 (Acta I, fo. 3v). Cf. also Sent. St A., fos. 107r-108v.
3. Glasgow Registrum, i, p.15.
4. SES, ii, p.59.
5. E.g. Acta I, fo. 54r, Raa v Greif, where a petition was brought apparently without any preliminary action.

upon the miscreants.[1] These letters were sent to the local dean of Christianity or curate for public exhibition and proclamation and contained a warning to pay the teinds,[2] or an inhibition from further obstruction of their rightful owners and from further intromission after receipt of the letters.[3] A statute of 1559 ruled that such letters 'monitory or inhibitory' were to be issued under pain of excommunication in the case of disobedience;[4] in the 1540s this penalty was usually, but not always, contained in the letters. If the warnings failed to have any effect, legal action could then follow. The Abbot of Newbattle took Nicholas Ramsay of Dalhousie and twenty-one of his tenants to court on 21 October 1546 petitioning for their excommunication on the double count of the unjust intromission of the teinds of Cockpen and of 'impeding the execution of letters monitorial the previous September and for contravening the tenor of the letters of the official of St Andrews, ordinary of the church of Cockpen'.[5]

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1. Cf. SES, ii, p.173. For the distinction between the monition contained in letters monitorial and the acts of monition which make up a large part of the Act Book entries, see below, 181-3.
2. E.g. St A. Form., i, p.381.
3. E.g. the letters of inhibition sent by the official of Lothian to the curates of Dalkeith, Lasswade and Roslin on 16 July 1546 (SRO, RH6/1380).
4. SES, ii, p.173.
5. 'Propter impedimentum per seipsos et ipsorum quemlibet et alios eorumdem nomine et mandato factum executioni litterarum monitorialium in mense Septembris ultime elapso et propter contraventionem tenorem litterarum domini officialis Sancti-andree ordinarii dicte ecclesie de Cockpen' (Acta I, fo. 5r). Cf. also ibid., fos. 3v, 9v.

Excommunication was not, however, the automatic penalty for the unjust intromission of teinds in the 1540s; it was in fact decreed on the defenders in only twenty-three of the sixty-seven teind-related sentences in the principal's court.[1] Much depended on whether letters monitorial had been delivered, and on their terms. If letters had been decreed containing a warning or an inhibition under the penalty of excommmunication, and if unjust intromission was proved after the 'execution of our inhibition',[2] then the threatened penalty would be enforced. The formalities seem to have been rigorously observed. Excommunication would take place expressly 'by reason of the inhibition legitimately executed against them';[3] but on another occasion the defender was sentenced to deliver the teinds but was absolved from the request for excommunication 'quia non constat de inhibitione'.[4] Quite what was in doubt as regarded the inhibition was not specified, but it was enough to rule out excommunication.[5] It seems likely that those sentences where excommunication was not imposed were not preceded by the issue of letters monitorial threatening the penalty.

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1. In only one sentence was an action for the recovery of teinds actually rejected (Sent. St A., fo. 76r).
2. 'Post inhibitionem nostram contra eos executa' (ibid., fo. 28v).
3. 'Causante inhibitione contra eundem dicto anno MDXLVI legittime executa' (ibid., fo. 214r).
4. Ibid., fo. 188v.
5. The references to 'inhibitions' rather than to 'letters monitorial' might raise the objection that the two might refer to two quite different processes; however, the two are clearly identified on several occasions where the letters are referred to as 'littere monitoriales seu inhibitoriales' (e.g. SES, ii, p.173; Acta I, fo. 109v; Sent. Laud., fo. 356r).

For many a would-be litigant in pursuit of his teinds it would have been achievement enough simply to secure his adversary's appearance in court. Non-attendance seems to have been the particular problem of teind actions and one that could delay the proceedings almost indefinitely;[1] it was a problem that the courts recognised and did what they could to alleviate. Most teind actions were pursued by some variation or other of summary procedure which allowed for an abbreviation of the ordinary plenary process,[2] but such measures had only varying success. A sentence on a teind dispute might be passed during the course of the autumn following the harvest in question,[3] but one action that was commenced before the beginning of Acta I in October 1546 was not decided until July of the following year, even though it was contested by a summary petition.[4]

(ii) Other Ecclesiastical Revenues

In order to analyse the proportions of the various types of business in the officials' courts we have considered all actions for ecclesiastical dues and revenues as one item,[5] but teinds were far from being the only concern of actions of this kind. Some twenty-three sentences in the principal's Sentence Book relate to what are generally termed 'annual rents'. These were the rentals

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1. See below, 286-7.
2. E.g. Sent. St A., fo. 22r; and cf. below,
3. E.g. Sent. St A., fos. 28r, 54r.
4. Acta I, fo. 211v.
5. See above, 156-7.

from tenements that had been endowed for the maintenance of a particular ecclesiastical post and it is likely, considering the extent of monastic appropriation, that such rents were of greater importance to parochial clergy than were the teinds themselves. The rents were occasionally due to a prebend such as that of Cameron which belonged to St Mary of the Rock,[1] but were owed much more often to chaplains and curates.[2] One example of such an arrangement comes from Perth where Sir John Piper, chaplain of the altar of the Visitation in Perth parish church, brought an action against the heir of the late John Piper who in his lifetime had bound himself and his heirs to pay to the chaplain of that altar the sum of twenty-six shillings and eightpence in perpetuity; this payment was now twenty years in arrears.[3] On other occasions the action would be simply for the rent due from a piece of land or from an urban property[4] which had been endowed for the incumbent of a particular altar or chapel; other actions were raised against unlawful occupation of endowed property.[5] It is to be hoped that such rents did not constitute the sole incomes of the chaplains concerned for in no case does the sum approach the twenty-four merks that the council of 1559 recommended as the stipend for curates.[6]

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1. Sent. St A., fos. 28v-29r.
2. Chaplains were generally attached to the service of an altar or chapel but the term itself was widely used and often referred to the effective parish priest (D. McKay, 'Parish Life in Scotland, 1500-1560', Innes Review, x [1959], pp.240-1).
3. Sent. St A., fo. 54v.
4. E.g. an orchard in Perth (Sent. St A., fo. 56r) or a tenement in Market Street, St Andrews (ibid., fos. 96v-97r).
5. E.g. the occupation of 'St Sebastian's Acre' which pertained to the altar of St Sebastian in the collegiate church of Crail (ibid., fo. 98r).
6. SES, ii, pp.159-60. In the dioceses of Aberdeen, Moray, Ross, Caithness and Orkney the sum was twenty merks.

The biggest annual rent pursued in the principal's court was ninety-eight shillings,[1] but a figure of ten or twenty shillings was more usual,[2] and it could be as low as five shillings.[3] Other actions for revenue included one brought by Cardinal Betoun for the recovery of meal,[4] an action for a pension of five pounds annually owed to the official of Dunkeld by the bailies of Perth,[5] and an action for cain brought by two chaplains.[6] Occasionally the fault was on the other side. In 1552 the guild of lanii of Perth, patrons of the altar of the Virgin of Grace, brought an action against the executors of the late chaplain who had apparently removed the altar's chalice.[7]

Into this category also fall a number of actions brought by parish clerks in the pursuit of their revenues. As 'official assistant minister' the parish clerk had many and varied duties within the parish,[8] and he also had his own share of parochial fruits: 'in every parish he could claim "clerk meal", a measure of milled grain, usually of oats or barley, at the rate of one firlot per plough'.[9] This share could be considerable in a large parish such as Kirriemuir

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1. Sent. St A., fo. 103r.
2. E.g. ibid., fos. 56r, 59r, 85r, 87v.
3. Ibid., fo. 44v.
4. Ibid., fo. 122r.
5. Ibid., fo. 146v.
6. Ibid., fo. 245v.
7. Sent. St A., fo. 262r.
8. D. McKay, 'The Duties of the Mediaeval Parish Clerk', Innes Review, xix (1968), pp.32-39.
9. McKay, 'Parish Life', p.247.

where Walter Gardyne was parish clerk.[1] Gardyne brought an action against sixty-two parishioners of Kirriemuir in January 1550/1 for a variety of fruits in the name of 'clerk meal' (pro clericali farine),[2] the quantities varying from a boll oats for each of the preceding four years to two firlots for the previous two years.[3] Another action was brought by Gardyne in April of that year and a third in August - this time against some seventy parishioners of whom many were being pursued for the second time. In the third action the parishioners, most of whom were described as 'husbandus' or 'cottar', were pursued for money sums averaging fifteen and twenty shillings, so it seems likely that this source of revenue also was commutable. Not all the proceeds would necessarily have gone to the parish clerk, however, as his income was liable to the same burdens of pension and appropriation as was that of the parish priest.[4]

Whatever the reason for Gardyne's programme of litigation, it can have done little for his popularity in the parish of Kirriemuir.

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1. This seems to accord with the practice of electing to this office a member of a locally prominent family; the Gardynes were an influential family in Angus (G.F. Black, The Surnames of Scotland [New York, 1946], p.288).
2. Cf. Sent. Laud., fo. 318v, where the deacons of Stirling were liable to the parish clerk for his fruits.
3. The parishioners are listed in groups according to the different communities of the parish - most of which are still identifiable.
4. Cf. the pension of twelve merks imposed on a parish clerkship by Archbishop Forman (St A. Form., i, pp.381-2).

Indeed, it is quite possible that this office was already generally unpopular; if so, one reason may well have been its association with the collection of one of the most unpopular dues of all - the mortuary:

> 'Thair umest clayis that was of rapploch gray
> The Vicar gart his Clark bear them away.' [1]

Even the church was obliged to admit the opposition to mortuaries and, following a petition to the council of 1559,[2] a belated measure was introduced 'for the relief of the poor and to allay the complaints and protests of the critics of mortuaries'.[3] The church would not go as far as abolishing the dues, but it restricted their exaction to payment in the proportion of forty shillings on ten pounds of all estates where the dead's part was valued at between one and ten pounds in value[4] with estates of greater value being taxed as before.

An indication of how oppressive this exaction could be before 1559[5] is found in a petition brought before the official of Lothian on 7 December 1546 by Sir Nicholas Wilkeson, Vicar of St

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1. Lindsay, Works, ii, 199, ll. 1995-6. 'Umest clayis': cf. below, n.4.
2. St A. Offic., xxx-xxxi.
3. 'In relevamen et subsidium pauperum, ad tollendum strepitum et murmur contra mortuaria obloquentium' (SES, ii, 167).
4. The forty shillings included, in composition, the upper garment (vestis superior or 'umest clayis') which had formerly been payable.
5. We do not know the precise rates prior to this date. Rules laid down by the church in the thirteenth century on the exaction of mortuaries specified the payment of a cow and the 'best coverlet' (major pannus), but they do not say what was the 'threshold' value at which an estate became liable to this due.

Cuthbert's, Edinburgh.[1] Wilkeson petitioned the widow of David Ravy for a 'sufficient mortuary according to the terms of his testament and according to the rate of his goods and [that laid down in] synodal statutes'.[2] The sum was specified at forty shillings since the estate exceeded the value of six pounds 'free money'.[3] Furthermore it appears that Ravy's two daughters had both died at the same time and accordingly Wilkeson claimed forty shillings for each of them since both had left 'free sums' in excess of six pounds.[4] In addition to the money payments the vicar also demanded Ravy's 'best upper garment'[5] worth three pounds, one of a pair of black cloaks worth fifty shillings that had belonged to the daughter Eufemia, and a black cloak worth three pounds that had belonged to the daughter Mariot. The traditional terms of the mortuary - an animal and the best garment - were not forgotten. On one occasion a widower was sentenced to pay a sum of forty shillings for his wife's upper garment and another thirty shillings for her 'most precious animal';[6] a second man had to surrender the second best animal that he and his wife had possessed.[7]

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1. Acta I, fo. 27v. He brought a similar action the following January (ibid., fo. 44r).
2. 'Secundum vires testamenti ejusdem seu secundum ratam bonorum dicti quondam David et statutorum synodalium'.
3. Libera summa: that is, the dead's part after all debts have been paid. Cf. the claim in the court of session in 1561 that a certain estate had not 'ten pundis of fre gudis' and should not, therefore, be liable for a mortuary (SES, ii, p.305).
4. The sum is specified at 'summa sex librorum et ultra', so six pounds was clearly the 'threshold'.
5. 'Vestis ejusdem superior melior'.
6. 'Pro preciosiore animali' (Sent. Laud. fo. 151r).
7. Ibid., fo. 59r.

It is not difficult to see how the demand for mortuaries could have provoked anger and resentment, especially when it is remembered that further payments were due to the church after a death on the grounds of funeral dues[1] and these too might be pursued in the courts.[2] Nevertheless, so far as the officials' courts were concerned, such actions were comparatively rare. No sentence relating to mortuaries was passed in either the court of St Andrews or of Lothian in the twelve-year periods we have been considering, and there was only one in each relating to funeral dues; the action of Nicholas Wilkeson was the only claim for mortuaries in the Lothian court between October and December 1546. It was perhaps fortunate for the reputation of the officials that they were called upon so rarely to enforce these hated exactions.

(iii) Priests and their Livings

The recovery of goods or money from the lay community was not the only reason why the clergy went to court. A number of sentences relate to disputes between churchmen over their benefices or livings. In view of the great amount of business concerning all aspects of benefices that was conducted at the Roman court,[3] it is surprising to find that this pre-occupation does not account for a proportionately large amount of business in the officials' courts;[4]

1. SES, ii, p.44.
2. E.g. Sent. St A., fo. 32v, where the vicar of Cupar pursued David Spens of Wormiston for £5 'jure funerali'. Cf. also Sent. Laud., fo. 292r, where the action was for 'Competentia mortuaria et duos vestes superiores et alia jura funeralia'.
3. See below, 256-7.
4. There were only eleven 'benefice' cases at St Andrews 1541-1553 and none in the Lothian court, 1539-1551.

there are only a few such cases recorded in the St Andrews Sentence Book and none at all (with the exception of actions relating to the election of parish clerks)[1] in the Lothian Sentence Book in the period under discussion. In general it would seem that those clerics who brought their disputes to the officials came from the humbler ranks of the clergy. Two chaplains had conflicting provisions to a chapel in the parish church of Dysart;[2] two more disputed the right to celebrate within the church at Conveth,[3] and a further two fell out over their claims to the annual rent due to a chapel within the parish church of Perth.[4] The only sentence of greater note concerned the possession of the rectory of Torry. James Wawane resigned the rectory at Rome in favour of Thomas Crichton, but reserved the right to its recovery; Crichton then resigned the rectory into the hands of Cardinal Betoun who appointed David Gourlay in his place; because of the terms of Wawane's original resignation this subsequent provision by Betoun was declared void.[5]

One echo of the great trade in ecclesiastical appointments which seems to have bypassed the officials' courts is to be found in Acta I where there is recorded a petition of William Meldrum, vicar of Peterculter, against John Hepburn, rector of Dalry. It had been Meldrum who, as notary public, had drawn up the letters relating to the resignation of the archdeaconry of Teviotdale by John Lauder[6] in Hepburn's favour. Such transactions involved a

1. These generally took the form of disputes between two rivals both claiming legitimate election (e.g. Sent. Laud., fo. 27r; cf. also St A. Offic., xxviii, 117, 120-1, 131-2, 137-8).
2. Sent. St A., fo. 10v.
3. Ibid., fo. 7r.
4. Ibid., fo. 86r.
5. Ibid., fo. 188r.
6. The same John Lauder who probably compiled the Formulare and who was clerk of the court of the official principal; for details of his life cf. St A. Form., vii-viii.

quantity of documents; Meldrum drew up eight copies, four of which he arranged to have carried to Rome by way of France, and four by way of Flanders. Despite having agreed to Meldrum's estimate of the cost when the business was undertaken, Hepburn had failed to pay.[1]

The officials had also to deal with the problems of the clergy as well as with the material possessions of the church. Two petitions brought before the official of Lothian in the autumn of 1546 reveal particularly bloody assaults on clergymen, one with a club and one with a sword and both leading to the spilling of blood.[2] On both occasions the petition was brought by the victim with the procurator fiscal 'pro suo interesse', and on both occasions the sentence of excommunication was demanded. Such offences were clearly regarded very seriously - all the more, perhaps, since the murder of Cardinal Betoun had shown that nobody's person was sacred. Excommunication could be accompanied by an order to pay the victim compensation[3] or the terms of the censure could be particularly strict; one layman who was excommunicated for an assault that led to 'the effusion of blood in great quantities' was referred to Rome itself for absolution.[4] On occasions the disregard for the sanctity of the

1. Acta I, fo. 13v.
2. Ibid., fos. 29v, 34r.
3. Sent. St A., fo. 49v. On another occasion, however, the victim was expected to bring another action to recover his expenses for 'medicos et curatores vulnerum ejusdem' (ibid., fo. 167r).
4. Ibid., fo. 182r. Cf. also St A. Form., i, 188, where temporary absolution was granted to enable a layman to journey to Rome and seek absolution for the killing of a priest.

church was remarkable: on 1 October 1546 George Hepburn and twenty-seven companions launched an attack on the convent at Haddington, fully armed and with 'nine or ten pieces of artillery', and gravely injured the prioress.[1]

The records make it clear, however, that the clergy were not always on the receiving end; indeed, clerics were as often the perpetrators of violent assaults, and even murder, as they were the victims. The burgess who wounded Sir William Davidson by the market cross in Perth on 8 December 1546 had acted under great provocation:[2] less than two months earlier the same Davidson had attacked and wounded both him and his servants 'to a copious effusion of blood'[3] and this case was not unique.[4] Such violent encounters could end in death and the clergy do not appear to have had a much greater respect for human life than did the laity. The customary process when a priest was suspected of murder was for the family or friends of the victim to be summoned to bring their accusations against the priest,[5] and if they failed to do so the priest would have had to purge himself of the alleged crime.[6] Purgation

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1. Acta I, fo. 7v. To the participants this was no doubt an unexceptional episode in a family feud. The prioress was herself a Hepburn and it appears that the convent was regarded as something of a family possession (cf. G. Donaldson, The Scottish Reformation [Cambridge, 1960], p.40; St A. Form., i, pp.334-6.
2. Sent. St A., fo. 49v).
3. Ibid., fo. 50r.
4. Cf. ibid., fos. 182r, 182v.
5. E.g. St A. Form., i, p.176. The initiative might also be taken by the procurator fiscal (e.g. St A. Form., ii, pp.151-3, 4-9; Sent. Laud., fo. 196v).
6. E.g. St A. Form., i, p.176, 324-7.

required the priest's oath that he had had no part in the crime, together with the supporting oaths of a specified number of other priests[1] that they believed him to be telling the truth. The three sentences in the principal's Sentence Book which relate to 'canonical purgation'[2] all found the accused priest innocent on the grounds of self-defence (ex sua extrema defensione) and it is recorded that letters testimonial or declaratory were issued in confirmation.[3]

Successful purgation meant that the accused priest would not be deprived of his living,[4] but there were grounds for suspension or deprivation where the initiative in prosecution could be taken either by the church or by laymen. While the archbishop might give his deans of Christianity general authority to take action against non-resident clergy,[5] it was open to the lay patrons of individual foundations to insist upon residence by the priest as part of the terms of his tenure. Thus the bailies of Kirkcaldy, as patrons of the chapel of the Blessed Virgin Mary in that town, were able to have the chaplain deprived on the ground of his absence abroad contrary to the terms of the erection of the chapel.[6] Another chaplain was suspended at the instance of the procurator fiscal for celebrating mass while under the sentence of excommunication.[7] These proceedings

1. The number could vary but two examples are fourteen and seventeen (St A. Form., ii, 7; i, 326).
2. Sent. St A., fos. 105v, 109v, 142v. These cases are not common and there are none in the Lothian Sentence Book between 1539 and 1551.
3. 'Litteras nostras testimoniales et declaratoris juri consonas desuper decernimus' (ibid., fo. 142v).
4. E.g. ibid., fo. 109v.
5. E.g. St A. Form., i, 15-17.
6. Sent. St A., fo. 98v.
7. Ibid., fo. 156r.

appear to demonstrate a disciplinary jurisdiction on the part of the officials but the distinction noted earlier[1] between the hearing of disciplinary cases and the ex officio promotion of such actions is maintained; in each case the action was brought either by an aggrieved party or by the procurator fiscal.

3. CONTRACTUAL BUSINESS

(i) Contested Cases

Most of the business so far considered related fairly clearly either to the church or to those areas of human affairs in which the church had a particular interest. So far as the church itself was concerned it would seem that its preoccupations were largely material and that the officials' courts were willing tools in the ordering of its affairs. It comes as something of a surprise, therefore, to find that a great part of the courts' labours had very little to do with the direct interests of the church. We have already seen how the moral importance attached to oaths gave the church a potential interest in almost every agreement or contract undertaken with a sworn pledge,[2] and it was this interest which lay behind a great part of the courts' daily business.

Straightforward actions for debt or for the recovery of goods account for sixty-one of the first instance sentences in the

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1. See above, 72.
2. See above, 132-3.

principal's Book (or slightly under sixteen per cent) and for 105 sentences in the Lothian Sentence Book (about twenty-nine per cent). In addition to these a number of sentences relate to the transfer of contracts or of other written agreements, usually made in favour of an executor, and to actions to enforce fulfilment of the terms of a contract. Such sentences amounted to a total of thirty-six in the principal's court (or nine per cent) and to forty (ten and a half per cent) in the Lothian court. When the two sets of figures are taken together, and when it is remembered that a large proportion of 'executry' cases were little more than actions for the recovery of goods or debts where death had overtaken a party under some obligation, it will be appreciated how important a role these courts played in the regulation of the commercial affairs of the community.[1]

The majority of actions which fall into this category have left only the briefest record and show little variation; the entry seldom goes beyond the names of the parties involved and the sum or goods at stake.[2] In the case of goods a monetary equivalent is

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1. Woodcock found a similar preponderance of small debt cases in the Canterbury courts: 'without investigation of contemporary ecclesiastical court records from other dioceses it is impossible to decide whether the Canterbury evidence of the amount of perjury business in matters of debt is of more than local significance, but it will probably be found that ecclesiastical courts throughout the kingdom were similarly employed' (Canterbury, p.90). It may be noted that studies of the church court records of fifteenth-century Lincoln produced a figure of twenty-eight per cent for cases of breach of faith (Morris, 'Consistory Court', 157, n. 4).
2. E.g. Sent. St A., fo. 13v; Sent. Laud., fo. 315r.

often given, such as 'the price of sixteen bolls of barley at the rate of eighteen shillings a boll'.[1] The variety of goods under dispute was considerable and while the alleged sale of a grey horse for five merks might seem a legitimate subject for a legal action,[2] the suit which ran to some twenty diets for the recovery of 'a green kirtle, a pair of french-grey hose and a pair of short, white hose' seems strange fare for an ecclesiastical court.[3]

The practice of registering contracts and agreements in the books of the officials' courts led to frequent actions with regard to their fulfilment. The officials were called upon to sentence contracting parties to complete their sides of the obligation or agreement[4] and to impose excommunication where necessary.[5] They might also be called upon to confirm that one or other of the parties had indeed fulfilled his side of the contract - a confirmation which could open the way to a subsequent action for non-fulfilment against the other party.[6] It was also within the power of the official to terminate a contract. An agreement could be deleted from the registers either in whole or in part following proof that its terms had been satisfied,[7] or it could be declared null on the

1. Sent. St A., fo. 78r.
2. Acta I, fo. 16v, Blackadder v Sinclair.
3. Ibid., fo. 32r, Cowper v Traill.
4. E.g. Sent. St A., fos. 174r, 248v; Sent. Laud., fo. 320v.
5. E.g. Sent. Laud., fo. 316r.
6. E.g. Sent. St A., fo. 266v.
7. E.g. ibid., fo. 71r.

grounds that one of the parties had been induced to give his consent through fear.[1] Most frequent of all were actions brought in order to have a contract transferred from a deceased party to his heir, executors or kin. The procedure was essentially straightforward: the surviving party appeared before the judge, produced a copy of the original contract and asked that its terms should be transferred to a specified third party. In the absence of any contrary plea by that third party the terms of the contract would be declared transferred and letters monitorial would be issued to enforce compliance with the decree.[2] Occasionally, however, the petition for transferrence was opposed, and formal litigation followed;[3] such cases seem rarely to have come to sentence.

(ii) Uncontested Business

In the majority of actions for transfer of a contract the proceedings seem to have been little more than a formality, with no objections lodged and all the necessary business concluded at a single hearing.[4] This was the pattern for much of the officials' work. His court was a convenient place for the transaction of all kinds of business that required a proper legal venue or sanction;

1. E.g. ibid., fo. 254v. It should be added, however, that in Hay's opinion fear did not excuse perjury nor compulsion invalidate an oath (Hay's Lectures, p.351).
2. E.g. Acta I, fos. 15r, 19v, Kadislie v Cuke.
3. Acta I, fos. 13v, Ker v Henrison; 15r, Bissart v Liston.
4. Ibid., fo. 29r, Spens v Dischington.

oaths were taken to observe the terms of contracts and obligations,[1] new charters could be ratified[2] and old ones produced for a formal acknowledgement by one of the parties.[3] The revocation of land claims could also be made before the official or his commissary.[4] This administrative function of the officials' courts is found all over Scotland (although Edinburgh and Glasgow were probably the busiest in the field),[5] and it was particularly active in the provision of judicial transumpts or copies of acts, sentences or contracts which had been entered in the court records. These transumpts were obtained by presenting a petition, sometimes by the direction of another court,[6] to the official or commissary requesting the appropriate extract from the records,[7] and a decree of transumpt would be given accordingly.[8] The number of historical documents that have survived in transumpt form is a testimony to this service provided by the courts.[9] It must also have been an

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1. E.g. SRO, Crail Burgh Records, B10/50; Morton Papers, GD150/702.
2. E.g. SRO, RH6/1658A.
3. Acta I, fo. 37v.
4. E.g. SRO, Yester House Writs, GD28/354.
5. Houlbrooke notes that 'the scribes probably spent as much of their time on such non-contentious acts as they did upon work connected with litigation and correction, and earned much more from them' (Houlbrooke, Church Courts and People, p.8).
6. ADC, p.230.
7. E.g. in the court of the official of Aberdeen (SRO, Haddo House Charters, GD33/65/1).
8. Transumpts were not confined to the original documents of one particular court: on 3 December 1547 the official of Lothian decreed a transumpt of a protocol in the book of Master Andrew Brownhill, notary public and scribe of the burgh court of Edinburgh (Acta I, fo. 245r).
9. Examples of obtaining transumpts survive from most dioceses, e.g. Glasgow (SRO, RH6/1551), Brechin (SRO, Mar and Kellie MSS, GD124/1/206), Moray (SRO, Mackintosh Muniments, GD176/21) and Aberdeen (Protocol Book of Sir John Cristison, 1518-1551, ed. R.H. Lindsay [SRS, 1930], p.122).

important source of revenue for the courts, or at least for the clerk; there is no record of the cost of obtaining transumpts in the church courts but the instructions for the new commissary courts drawn up in 1563 specified a charge of thirteen shillings and fourpence for the 'transumpt of evidentis, or uther writings'.[1]

Another important function of the officials' courts was the registration of contracts. All major courts including the court of session, the admiralty court and the sheriff courts as well as the ecclesiastical court had facilities for the registering of contracts and agreements in their books whereby the agreement acquired the force of a decree of that court.[2] The practice of registering obligations seems to have been an early development in the church courts[3] and by the sixteenth century accounted for a large part of its administrative business - both in the recording of detailed contracts and in the entry of minor obligations in the Act Book. Contracts registered in this way generally contained a clause submitting the parties concerned to the jurisdiction of that

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1. BP, ii, p.662.
2. Cf. below, 186; also Fife Court Book, p.332; Thomson, Public Records, pp.43-44.
3. 'The history of legal diligence begins with the bond containing a clause whereby a debtor submitted himself to the jurisdiction of a church court ... Of the antiquity of this practice there is no doubt. How far back it goes in Scotland it is impossible to say, as the records of our ecclesiastical tribunals have disappeared' (Thomson, Public Records, p.44). Cf. also, A.J.M. Stuart, 'Moveable Rights', Scottish Legal History, pp.206-7.

particular court and would usually be subject to the penalty of excommunication in the event of non-fulfilment.[1] A separate register or contract book would probably have been kept for these more important agreements.[2]

Few day-to-day obligations, however, would have required the detail and expense of a formal contract,[3] and instead there had evolved a simple process which could be conducted with the minimum of fuss apud acta (that is, in the course of ordinary court proceedings). Of the 1099 entries in Acta I between October and December 1546, 213[4] record little more than that the judge had warned party A to pay a certain sum, or fulfil a certain obligation, to party B within a specified time.[5] A small sum of money was the most frequent object of these acts of monition but goods were also common; they were generally fairly trivial objects like a pair of

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1. E.g. the contract that was to be registered in the book of the official of Moray under pain of cursing (SRO, Mackintosh Muniments, GD176/56).
2. Thus a contract was extracted from the 'contract book' of the official of Lothian (SRO, RH6/1085B).
3. Again, there is no reliable evidence for the cost of these procedures before the Reformation. The commissariat instructions, however, specify a charge of 3/3d for the registration of contracts within a specified size, and 6/8d for larger entries. The cost of 'putting of ane act in the buke' was only 4d and this may well have represented the sort of difference between registering a contract and 'acting' an obligation in the officials' courts.
4. I.e. about 19%. This seems to have been a fairly average proportion: in the equivalent periods of 1547 and 1548 the number of monitions were 95 out of 467 entries (c. 20%) and 94 out of 703 entries (c. 13%) respectively.
5. The time allowed for payment in Acta I monitions varied considerably. Often the date was assigned to a specific feast day, and thus in the first half of November the feasts of St Andrew, St Thomas and Christmas were frequently used (Acta I, fos. 9v, 12v, 14r). Periods of 15 and 20 days were also specified (ibid., fos. 35v, 21v), but it could be as short as three days (ibid., fo. 1v) or as long as a year and a day (ibid., fo. 32r). Occasionally no dead-line was specified at all (ibid., fo. 26v).

shoes[1] or a table-cloth.[2] Occasionally in Acta I it is recorded that someone has received such a warning 'on his own confession' (ex sua propria confessione) and under pain of excommunication,[3] a sanction that was not normally included. By contrast to Acta I, Acta II is entirely devoted to the record of these acts of monition, some at considerable length and all made 'ex sua propria confessione' and under pain of excommunication. At Dunblane the record is slightly different again; the acts of monition, which account for the majority of all entries,[4] are interspersed among the records of regular court procedure in the manner of Acta I, but are all ex sua propria confessione and under pain of excommunication. Finally, there is one further factor to be considered: the majority of the entries in Acta II have been scored out, but in Acta I and the Dunblane Acta only a few have been so deleted.[5]

What sort of procedure do these acts of monition record? The first thing to note is the distinction in usage between the warning contained in an act of monition and the warning contained in letters monitorial, such as were decreed against the intromittors of teinds,[6] because both could be termed 'monition'.[7] Letters monitorial could be issued under a wide variety of circumstances before, during or after a suit and threatened excommunication in the case of disobedience; this was clearly a somewhat different process from the

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1. Ibid., fo. 21r.
2. Ibid., fo. 14r. Occasionally more substantial items appear, such as 'sixteen loads of coals' or a cow (ibid., fos. 25r, 26r).
3. E.g. ibid., fo. 36r.
4. E.g. 334 out of a total of 529 entries between October and December 1551.
5. Between ten and fifteen per cent of Acta I monitions have been deleted.
6. See above, 161.
7. E.g. SES, cclxxxviii-cclxxxix.

acts of monition recorded in the Act Books. The Dictionnaire de Droit Canonique is able to make the distinction in French between 'monition' and 'monitoire' (to which littere monitorie is given as an alternative).[1] The principal distinction is that the former is essentially a preventative measure designed to avert the committal of an offence, and which may be made either privately or publicly,[2] while the monitorie is a public process which threatens the penalty of cursing in the case of disobedience. Such letters monitorial are said to have their origins in the decretals of Alexander III to enforce the appearance of reluctant witnesses,[3] and they were certainly regularly used in this way in the Lothian court.[4] Acts of monition, on the other hand, undoubtedly have the appearance of preventative measures; they do on occasion follow some form of contested procedure, but it is clear that in these cases one or other of the parties had decided not, after all, to contest the claim but to admit his obligation instead.[5] Monitions were not the result of the proof or disproof of a contested action and there was probably seldom any dispute about the process; it was clearly a voluntary procedure. This is the significance of the phrase 'ex sua propria confessione' which was included in all but the minor acts of monition. We may note also that the declaration of the court vacation in Dunblane excluded from the general suspension of

1. DDC, vi, cols. 938-941.
2. Ibid., vi, col. 938.
3. Ibid., vi, col. 940.
4. See below, 308.
5. E.g. Scott v Ahanney (Acta I, fos. 11r, 21r, 25r) and Anderson v Douglas (ibid., fos. 4r, 6r). In each case the proposal of a cedula (cf. below, 254-6) was followed shortly afterwards by the defender admitting his obligation.

business those cases in which the parties had arrived at an agreement (causibus quibus concessus partium intervenerit)[1] and, as we have seen,[2] acts of monition were frequent during the vacation periods both in Dunblane and Edinburgh. In another example a sentence which had been entered in the Lothian Sentence Book was subscribed with a note to the effect that the sentence had not been promulgated because of the agreement reached between the parties;[3] shortly afterwards there was recorded an act of monition between the same parties which presumably embodied the terms of that agreement.[4]

Nevertheless, if we are to distinguish a monition from letters monitorial as being a simple warning voluntarily incurred as opposed to a public order to do, or to refrain from doing, something under the pain of excommunication, then there are first a number of anomalies which must be resolved. We are confronted with the discordant evidence of Acta II and the Dunblane Acta where monitions were invariably reinforced with the threat of cursing, and we must consider also the precise purpose among the records of the Lothian courts of Acta II, a volume which has received only scant attention in the past. The resolution of both these problems can

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1. Dunblane Acta, fo. 401v.
2. See above, 93-94.
3. Sent. Laud., fo. 337r, Newton v Scott.
4. Acta I, fo. 174v. Litigation could follow a monition if, like any other agreement, it was not observed - e.g. Guld v Thayne, where the defender had previously been 'acted' for his obligation in the book of the official principal (Acta I, fo. 7r).

best be approached through an examination of the contents of the acts of monition themselves. The 213 monitions that were recorded in Acta I between October and December 1546 deal in general with only minor sums and articles; 168 of them are concerned with sums of money or goods whose monetary equivalent is stated, and although sums as large as twelve pounds occur[1] the average sum is about thirty-two shillings, and could be as low as twenty-three pence.[2] This presents a striking contrast to Acta II where the acts of monition concern much greater sums. A similar analysis of ninety-one 'monetary' monitions recorded between October and December 1551 in Acta II shows an average value of thirty-two pounds - twenty times the average value in Acta I. Clearly Acta II is not an act book in the same sense as Acta I; it would seem that it was in fact a register for monitions of greater importance, where it was necessary to record in writing the fact that the party admitted the obligation by his own confession and where the sanction of excommunication was added as a further safeguard. Where sums of £200,[3] or goods to the extent of sixty chalders of meal,[4] were involved it is not surprising that a weightier form of record was preferred, nor is there any doubt that cursing would follow if the terms of such an

1. Ibid., fo. 7r.
2. Ibid., fo. 38v.
3. Acta II, fo. 16v.
4. Ibid., fo. 7r.

agreement were broken.[1] The two Act Books should therefore be seen as complementary to each other; both recorded voluntary agreements, albeit on a different scale, and there is no doubt that a volume similar to Acta II once existed for the period covered by Acta I. As the Lothian court was probably one of the busiest in the country we cannot assume that the practice there was common to all Scottish ecclesiastical courts; the Dunblane Act Book suggests that in other courts it may have been the practice to record all such acts of monition in the same volume, and in that diocese at least it was certainly the custom to reinforce all the transactions with the sanction of cursing.

There is little doubt that the acts of monition recorded in the surviving Act Books are the record of the process of 'acting' obligations and agreements, a process familiar to us from protocol books[2] and other sources of the period. Thus we find in a vernacular record that a contract was to be registered 'in the buikis of the Officiale or his Commyssiaris of Dunkeld and thair to be monyst and ackit to fulfil and keip the samyn.[3] 'Acting' was the means by which agreements were registered, like contracts, in the books of

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1. Cf. St A. Form., i, pp.259-60, where excommunication was imposed on parties who had been warned apud acta, and eorum propriis confessionibus intervenientibus, to pay a certain debt, and had not done so.
2. Cf. particularly The Protocol Book of Sir Robert Rollock, 1534-52, ed. W. Angus (SRS, 1931), and The Protocol Book of Sir Alexander Gaw, 1540-58 (SRS, 1910).
3. J. Anderson, The Oliphants in Scotland (Edinburgh, 1879), p.78.

a particular court. As with more formal contracts submission to a particular jurisdiction was often specified. If the parties were subject to more than one jurisdiction one might be renounced in favour of the others;[1] for greater effect an obligation could be acted at more than one court, for example at the principal's court in St Andrews and at the court of session.[2] The particular signigicance of such registration was the legal value that it gave to the contract or obligation in question. Thus a contract made at Falkirk in March 1549/50 was 'to be inserted and registered in the commissary books of Stirling and there to have the strength of an act';[3] another agreement, concerning the fruits of a vicarage, was registered in the Stirling Acta 'for greater security'. The greater security was simply that such registration turned the contract, for all legal purposes, into an act of court. Such an act could be renounced in favour of an assignee,[4] and if one of the parties died it could be transferred by an action of transfer in the same way as a contract.[5] It seems likely from earlier evidence that the official had discretion to extend the term of payment if an obligation voluntarily admitted could not be fulfilled without hardship.[6]

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1. E.g. the renunciation of Dunblane in favour of St Andrews (Prot. Bk. Gaw, 51) and of St Andrews in favour of Dunblane (Prot. Bk. Rollok, 45).
2. Prot. Bk. Rollok, 45.
3. Stirling Acta, fo. 23r.
4. Protocol Books of Dominus Thomas Johnsoun, 1528-78 (SRS, 1920).
5. E.g. Acta I, fo. 14v, Pot and Paterson v Ker.
6. NLS, Adv. MS 34.7.3, fo. 56r. The entry dates from the time of Archbishop Scheves.

Monitions entered in the Act Books were scored out when the terms of the obligation had been fulfilled and when the beneficiary of that obligation had requested the entry to be deleted. Thus a monition dated 3 December 1546 warning John Ahannay to pay Alexander Scot thirty-four shillings and tenpence at the feast of St Kentigern next (13 January) was deleted and subscribed with a note to the effect that on 13 January 1546/7 Mariot King, wife of Scot acknowledged receipt of the sum 'contained in this present act' and consented to its deletion.[1] The fact that only a few of the acts of monition recorded in Acta I have been so deleted is not evidence that the obligation was not in fact fulfilled. Deletion required a specific act on the part of the satisfied party and would certainly have involved further expense; one of the advantages of recording a monition in Acta I is that it would probably have been a great deal cheaper than recording it more formally in a volume such as Acta II,[2] and deletion would be desirable only when a record of fulfilment was particularly necessary. The greater proportion of deletions in Acta II is further evidence that the monitions acted in its pages were of comparatively greater significance.

The whole subject of monitorials and monitions is a confusing one and we will conclude with a brief summary of the different aspects involved. We should remember, however, that any distinctions we may make between one 'type' or another of admonitory process is

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1. Acta I, fo. 25r.
2. See above, 180n.

essentially one of convenience; a mediaeval lawyer would probably not think in terms of different processes but rather of different applications of the same basic principle. The first thing to note, then, is the distinction between letters monitorial and an act of monition. The former took the form of a warning to do a specific thing, or to desist from some course of action that was about to be, or had already been, undertaken; it would usually incorporate the sanction of excommunication, to be effective in the event of disobedience. An act of monition, on the other hand, was a voluntary obligation by which the parties themselves agreed to record some contract or obligation and to submit themselves to the jurisdiction of a particular ecclesiastical judge or court. Acts of monition can in turn be separated into two categories: there were those minor transactions in which a party was warned apud acta to fulfil a certain obligation, and there were the more important agreements wherein the voluntary nature of the proceedings was expressly recorded, and where also fulfilment was enjoined under pain of cursing. In the Lothian court, at least, this latter group of monitions were usually recorded in a separate 'Act' Book. An act of court to delete the record of the monition once it had been fulfilled was common but not essential.

It was suggested at the beginning of this section that the work of the officials' courts might have been shaped more by the needs of the lay community than by the obvious interests of the church. This seems to be borne out by the evidence of the Sentence Books and

Act Books. Considering the evidence of the Lothian Sentence Book we have found that twenty-nine per cent of the sentences relate to the regulation of testamentary affairs which, although an ancient duty of the church, was clearly a vital service to the community. A further twenty-nine per cent of sentences relate to actions for breach of faith in various obligations, and ten and a half per cent concern the regulation of contracts. These figures are echoed in the evidence of Acta I; although the shortness of the period which has been chosen for particular study in Acta I makes the statistics of limited value by themselves, the figures of thirty-four per cent for executry cases, twenty-seven per cent for debt, and thirteen per cent for contract cases are strikingly similar to those emerging from the Sentence Book.[1] It suggests that about seventy per cent of contested cases in the court of the official of Lothian had very little to do with direct church interests. In this the Lothian court was probably the most extreme example; certainly the equivalent figure in the St Andrews court drops to about forty-six per cent. But we should remember that about twenty per cent of all entries in Acta I between October and December 1546 were records of acts of monition, and the evidence of the Dunblane court shows that this proportion was not unduly high; there would have been a considerable amount of such business at the principal's court in St

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1. Other figures from Acta I for this period are: teinds etc., thirteen per cent; defamation, two per cent; assault, three per cent; matrimonial, one per cent; petitions for absolution, five per cent.

Andrews also. We should remember too that the officials appointed curators and executors, presided over land settlements and issued transumpts. Altogether the officials of St Andrews must have devoted a considerable amount of their time to the business interests of the laity.

PROCEDURE IN THE OFFICIAL'S COURT

PROCEDURE IN THE OFFICIAL'S COURT

Accounts of procedure in the ecclesiastical courts of Scotland are few and far between; little survives in the way of contemporary examples, and little has been done since to unravel the complexities of mediaeval processes. Our first surviving account of procedure in the church courts resulted not from any attempt at codification as such, but from the desire of parliament to meet contemporary grievances about the time, trouble and expense involved in ecclesiastical litigation. It was included in an act of parliament of 1427 and was framed in order 'to reduce the troubles and expense of poor people litigating in the spiritual courts, and to abbreviate the processes for greater speed'.[1] The purpose of this act was confined to those occasions when a layman was pursuing a cleric, and this was no doubt the source of many popular complaints, but it was a useful statement of consistorial practice and one which was repeated, in the vernacular, a century and a half later by Balfour who gave it the title 'Form of process before the spirituall Juge'.[2] The next account of court procedure also came about as the result of a desire to reform and streamline the procedure rather than to define it, and it came from the church. The provincial council of 1549

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1. 'Ad parcendum expensis et vexacionibus pauperum in curia spirituali litigancium et ad abbreviandum lites pro expeditione' (APS, ii, 14).
2. BP, i, 30.

framed a number of statutes directed at the improvement of the judicial process, of which the most important one - entitled 'Concerning the reform of processes in the courts spiritual' - laid down rules for a summary procedure to be followed in civil cases where the sum or goods at stake did not exceed twenty pounds in value.[1]

In neither case, however, do we have an account of contemporary forms of procedure as they were actually being followed at the time. Although it is unlikely that so small an attempt at reforming so complex a machine would have departed very far from the established principles of customary practice, we cannot assume that what was proposed as ideally desirable was ever in fact achieved. In addition to these examples, and before we turn to the surviving records of the courts themselves, there are two indirect sources which may help to give us a general background to the types of process which we will be discussing: practice in English church courts, and practice in the contemporary civil courts of Scotland.

More work has been done on the church courts of England, although not as much as one might expect given the very much greater volume of records available. In the nineteenth century a valuable summary of procedure emerged as a result of a parliamentary commission

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1. SES, ii, pp.124-5.

of enquiry into the ecclesiastical courts,[1] and this was followed some time later by an examination by Canon Stubbs of the courts in their historical context.[2] The procedure examined was, of course, that of the contemporary Anglican church, but with a legal system so shaped and governed by tradition the account remains worth considering. The initiation of a suit between two private parties involved the presentation of a written 'libel' by the pursuer, in which the several points at issue were dealt with in separate 'articles', and which the defender would then counter with a responsive allegation. 'The pleadings thus bring forward all the facts intended to be relied upon and proved on each side, and no surprise can well take place'.[3] In the matter of evidence, the depositions of witnesses were taken privately by an examiner of the court who framed his own questions relative to the individual articles of the libel. Once this principal examination had been concluded and signed the cross-examination was conducted by providing the examiner with a prepared interrogatory which he then put to the party or witness concerned.

> 'The Evidence on both sides being published the cause is set down for hearing. All the papers, the pleas, exhibits, interrogatories and depositions, are delivered to the judge ... some days before the cause is opened.'[4]

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1. Parliamentary Papers 1831-32 (199), xxiv, The Special and General Reports of the Commissioners appointed to inquire into the Practice and Jurisdiction of the Ecclesiastical Courts, 16-21.
2. Parliamentary Papers 1883 (c. 3760), xxiv, Report of the Commissioners appointed to inquire into the Constitution and Working of the Ecclesiastical Courts, 21-51.
3. Parliamentary Papers (1883), 18.
4. Ibid., 19.

The nineteenth-century system clearly depended on most of the spade-work being done before the formal hearing of the case began in court, and largely confined court appearances to the exchange and examination of documents. This form of procedure finds a clear parallel in the records of proceedings in mediaeval English church courts. Professor Colin Morris came to much the same conclusions as the parliamentary commissioners when he examined the consistory court at Lincoln in the middle ages, and found that:

> 'The procedure followed in the courts of the Church was a written one, and little happened on each court day beyond the formal exchange of documents, such as written evidences and depositions of witnesses.'[1]

By this means the courts were able to accommodate a great number of different disputes in the course of one working day.

Turning to the individual steps of procedure in the mediaeval courts we find little variation in the different English dioceses in the forms of process used by the church lawyers. Studies of the courts at both York and Canterbury show a very similar sequence of steps which may be briefly summarised.[2] The contending parties in an instance suit would generally appoint procurators to represent them before the pursuer produced his libel. Once the libel had been proposed the defender might either make reply, and thus officially take up the challenge of the pursuer, or he could produce some exception

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1. Morris, 'Consistory Court', p.157.
2. J.S. Purvis, An Introduction to Ecclesiastical Records (London, 1953), pp.66-70; Woodcock, Canterbury, pp.52-59.

to the fact of the libel being presented - perhaps on the grounds of irrelevancy or incompetence. If an exception was made it had to be disposed of before any further action could take place in the principal cause; but whether it was the libel or an exception that was contested the procedure was essentially the same. Probatory diets were assigned for the production of witnesses and other evidence, the proof was summed up at a further diet and then the judge concluded the case. This bald framework provided great scope for a skilful lawyer. Exceptions took up much of the court's time; in a case heard at York the defence set out to prove, on the basis of minor spelling differences, that there were no such places as those named by the prosecution.[1]

Turning to the evidence of Scottish courts there is much that can be learnt from the forms of procedure that were developing in the lay courts of the sixteenth century. Clearly the evidence of a court such as the court of session cannot be regarded in any way as authoritative when we come to consider the practice in the courts spiritual, but there is good reason to believe that customary rules of procedure did not differ greatly between the two jurisdictions. Legal development within the church had been steady since the early days of chapter jurisdiction in the thirteenth century,[2] whereas it was only with the foundation of the college of justice in

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1. Purvis, Records, p.67.
2. See above, 84-86.

1532 that 'some certainty in interpretation and administration was introduced into Scots law for the first time',[1] and it would be natural for the lawyers of the younger system to look to the older for inspiration and example. This would seem especially likely when we remember the close links of the court of session not only to the church in general, but to the church courts in particular. The initial composition of the college of justice was half lay and half clerical, under the presidency of the Abbot of Cambuskenneth.[2] We have seen also that Abraham Crichton was only one of a number of ecclesiastical judges who served also as judges of session[3] - a link that was equally strong in the practices of some of the more distinguished advocates.[4] These considerations make the records of the lay courts, and in particular a volume like Balfour's Practicks, of considerable value to the student of the church courts. The Practicks is not primarily concerned with rules of procedure nor is it, as its modern editor is careful to point out, a treatise on legal principles in the manner of the Institutional writers, but rather it is 'a written statement in the vernacular of the whole of the customary law of Scotland together with such statutory modifications as there had been grafted upon it'.[5] Nevertheless it contains much incidental information on the progress of a suit through the various stages of legal contest,

1. J. Irvine Smith, 'The Transition to the Modern Law, 1532-1600', Scottish Legal History, p.25.
2. Acta Sessionis (Stair), xiv.
3. See above, 103.
4. See above, 123.
5. BP, i, xl.

and despite the Reformation Balfour carefully included much that related specifically to the courts of the pre-Reformation church.[1]

So far as the sources of church court procedure in Scotland are concerned, their extent is very much the same as those of the history of the courts in general: there are a few major sources which are supplemented by a large amount of individual items which have, incidentally, preserved some aspect or procedural stage of the consistorial process. We are fortunate that the surviving Act Books illustrate the procedure of not only one of the major church courts in the country but also of one of the more rural courts - that of Dunblane. Our principal source, though, remains Acta I where during the period between October and December 1546 there were, in addition to the 213 acts of monition which we have already discussed,[2] some 256 new actions initiated; the subsequent course of each of these actions, whether they were dropped at once or sustained for years, has been followed.

The first thing that such an examination demonstrates, apart from the fact that many actions got no further than the initial record, is that there was more than one way of prosecuting an action in the official's court. For the sake of clarity, however, the suits can initially be divided into two types: there were those which were

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1. See below, 265.
2. See above, 180-7.

contested by the rules of plenary procedure, and those which were contested by some form of abbreviated, or 'summary', procedure. To the first category we can assign cases contested by libel or plenary petition, and to the second those that were contested on the basis either of a summary petition or of what was termed a cedula.[1] Once again, however, any distinctions which we find it convenient to make in discussing these procedures should not be regarded as either absolute or authentic in sixteenth-century terms. While the distinction between 'plenary' and 'summary' procedures was clearly recognised by the canon lawyers,[2] it was perhaps understood more as the different applications of the various parts or options of the regular procedure which could be expanded or contracted according to the particular needs of the moment. For this reason our discussion of procedure will be based on the contest of a plenary action; following this we can turn to look at some of the common variations or contractions which made up summary procedure.

1. PLENARY PROCEDURE

(i) Citation

The ordeal of Henryson's sheep began with his summons by the proper form of citation 'under the panis of hie Suspensioun'.[3]

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1. The term originally meant a short document attached to a roll or longer document; as the obvious translation ('schedule') does not seem to be very useful here, the Latin word will be retained in discussing this form of procedure.
2. Cf. for example, SES, ii, p.125.
3. See below, Appendix I, 333.

The citation, or summons, was a central part of the court's machinery. Its importance has been stressed by a historian of the canon law of the English courts:

> 'So absolutely essential is the citation as the beginning and foundation of every judicial proceeding, that every judicial act exercised against a person not cited, or not cited to answer the particular matter named in it, is null and void ipso jure.'[1]

Every stage of an action was followed by the citation of the parties or their representatives to the next diet of the case, and the fact was recorded at the end of each entry in the Act Book as partibus (or procuratoribus) citatis or, if the citation was by letter in the absence of the parties concerned, litteratorie citatis. Of all forms of citation it was the initial one, to obtain the appearance of a party at the beginning of an action, that presented most problems for the court. These citations were not recorded in the Act Books but the formalities can readily be reconstructed from other sources. The pursuer or his representative requested from the judge a mandate for citation[2] which would be despatched for execution under the hand and seal of the judge[3] to a local authority or officer, who was usually the parish priest. The parties named in the summons would be cited publicly, usually on Sunday at the time of high mass when the greatest possible audience could be expected.[4] If personal access to the parties concerned was not

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1. O.J. Reichel, A Complete Manual of Canon Law (London, 1896), ii, 273.
2. E.g. Fraser, Eglinton, 163.
3. E.g. ibid., 175.
4. Although this was the one day when officers of the lay courts could not execute a summons (BP, ii, 303).

possible a written copy of the citation could be fixed to the doors of their houses, as was the case in the Eglinton divorce,[1] or to the door of the parish church.[2]

As well as being well publicised the citation had to give the parties named due warning. This could be achieved either by a 'simple' citation, which had to be repeated three times, or by a 'peremptory' citation which required only one execution but which had to allow an interval equal to that of three simple terms.[3] The Act Books seldom make clear precisely what form of citation was involved but it seems that the strict canonical procedure may, in practice, have been variable. The official of Lothian issued a warrant for the citation of Archibald Douglas on 4 August 1554; the citation was executed just twice, on Sunday 5 August and on 19 August, before the chaplain returned the endorsed warrant to the official.[4] On another occasion, however, three witnesses were cited on Monday 16 April 1548 to appear before the official of Lothian on the following Monday; when the action resumes on 23 April the pursuer's procurator complained that the citation, executed for the

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1. Fraser, Eglinton, p.169. In this case it was the vicar of Dundonald who was charged with executing the citation.
2. E.g. Acta I, fo. 50r. In English courts this involved a citation viis et modiis which allowed citation by any possible means (Woodcock, Canterbury, p.51; F.S. Hockaday, 'The Consistory Court of the Diocese of Gloucester', Transactions of the Bristol and Gloucestershire Archaeological Society, xlvi [1924], pp.230-1). It is not clear whether this term was current in Scotland but the general effect seems nevertheless to have been achieved.
3. Cf. Reichel, Canon Law, ii, p.270.
4. SRO, CH8/15.

first time only the previous day, had allowed the persons concerned too little time and he moved for the postponement of the day's business.[1] It would seem that citations made during the course of an action either required only one execution or were always peremptory, and indeed if the parties concerned were already present in court at the time of the citation it would probably be considered to have been duly executed apud acta;[2] but at the beginning of an action, or in more serious cases, a longer period would obviously be needed. It is clear though that some confusion could surround the legitimate execution of a citation and that, just as in England, any irregularity would be enough to invalidate the proceedings of the diet to which it had applied. Although in the example quoted from April 1548 there was no suggestion that the citation had actually been unlawful, an entry in the Dunblane court is found marked 'invalid, on account of the unlawful execution of the citation!.[3]

The church could ill-afford any weakness in the machinery of citation since it was in obtaining the initial appearances of the parties in court that the greatest difficulties were experienced. In England the records of the diocese of Lincoln have prompted the comment that 'the large number of marginal notes of non comparuit

1. Acta I, fo. 385r, Machane v. Blackstock.
2. Often the protagonists would be cited to a diet the following day, obviously allowing no time for formal citations. In the case of Bassantyne v. Todhunter the parties were cited on 22 Nov. 1546 'ad jurandum cras', and then on 28 Jan. 1546/7 'ad ponendum et articulandum cras' (ibid., fos. 19r, 57r).
3. Dunblane Acta, fo. 331v.

testify to the greatest single problem of ecclesiastical jurisdiction, that of ensuring attendance'.[1] Although the question of disobedience to the courts in Scotland is one that will be discussed later,[2] it may be noted here that the Lothian court appears to have had similar difficulties. The records of individual diets often contain the brief note that 'the judge issued letters' (judex decrevit litteras), which means that some party or witness had failed to appear at the appointed time and that letters threatening, or imposing, censure had been directed against him. A party who did not comply with the terms of the original citation risked incurring a number of penalties. A small formulary of the late fifteenth century has preserved the progressive forms of citation in the case of disobedience that were used by the court of the official principal of the time, and which are unlikely to have been much altered by the 1540s.[3] The first stage merely required the curate of the parish to cite the party to appear before the official principal on a specified day and to answer to the claims made against him. By the second form the curate would denounce the party contumacious for his non-appearance and would cite him again under pain of suspension; and by the third form the party was declared suspended 'ab ingressu ecclesie' and was cited once more under pain of excommunication, which would be automatically incurred by further disobedience.

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1. Bowker, Episcopal Court Book, xiv.
2. See below, 286-7.
3. NLS, Adv. MS 34.7.3, fo. 30v. See below, Appendix IV, pp. 353-4.

(ii) The Libel

Despite these difficulties, however, the majority of citations achieved their purpose, and having summoned his adversary to court the pursuer could present his claim in the form of a written libel. This document, like the citation, was not recorded in the Act Book but it can be illustrated from other sources. It was a formal document whose composition differed little over the centuries; its validity depended on the proper inclusion of certain specific facts and to avoid mistakes a lawyer might well have relied on an aide-memoire such as that composed by the thirteenth century jurist Hostiensis:[1]

> 'Quis, quid, coram quo, quo jure petitur et a quo,
> Recte compositur quisque libellus habet.'[2]

Thus in a detailed libel produced before the official principal of St Andrews in 1411 we find each of these points covered. The document begins by stating that before the official of St Andrews ('coram quo') 'I, Andrew de Wynton prior of Loch Leven' ('quis) stood opposed to William Barclay of Cullairnie ('a quo'); it then goes on to relate that the priory of Loch Leven had, since before the memory of man, been in possession of the lands of Bollgyne ('quo jure') and that William Barclay owed arrears of rent on that property ('quid').[3] The same basic formula may be found in the libel of the chapter of Glasgow brought before the official of Glasgow at the end of the fifteenth century, and elsewhere.[4]

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1. I.e. Henricus de Segusia, Bishop of Ostia.
2. R.W. Millar, 'Memory Verses of the Romano-Canonical Procedurists', Juridical Review, lxvii (1955), 286. For an English rendition cf. Reichel, Canon Law, ii, 266n.
3. St A. Lib., 19-20.
4. Glasgow Registrum, ii, 497-8.

So far as the ensuing action was concerned the two most important parts of the libel were the title to pursue (that is, the interest in the matter under dispute which gave the pursuer the right to a legal claim) and the substance of the claim itself. The need to demonstrate a 'title' accounts for the often lengthy passages in libel documents which explain the pursuer's right to the goods or moneys in question; it might take the form of a long history of a particular land holding, or it might simply take the form of a document, but once accepted as legitimate the title could not itself be directly challenged.[1] The substance of the claim was, of course, the matter around which the subsequent action would revolve. The libel document reserved the right of the pursuer to make any addition, subtractions or alterations that he thought fit,[2] and this privilege was probably designed to avoid the long delays that could result from objections on purely technical points. Thus in one case in Acta I we find that the defender objected against the libel (which was not recorded); in answer the pursuer's procurator added to the libel the words 'who died in the month of November last', and the objection was dismissed.[3]

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1. 'De stilo presentis curie ubi aliquod scriptum productum in judicio ut titulus partis adverse non audiatur impugnari' (Acta I, fo. 46r, Wr and Smith v. Machane). In the lay courts such 'titles' could be challenged once the case had reached probation (BP, ii, 293).
2. E.g. 'protestando insuper de hunc suum libellum addendo mutando et minuendo ac ad calamum corrigendo toties quoties opus fuerit et videbitur expedire' (Glasgow Registrum, ii, 498).
3. Acta I, fo. 32v, Cochrane v. Loutefute.

At this preliminary stage there was still open to the aggrieved party an alternative to the production of a written libel. Balfour's definition of a libel as 'ane petitioun made in writ by the persewar'[1] suggests that petitions need not have been confined to 'writ', and that they could in fact have been delivered verbally. This seems to have been the case in the Lothian court, where actions were frequently contested according to plenary procedure on the basis of a 'petition' rather than a 'libel'. The most obvious difference between the two is apparent in the Act Book at the stage where the action was first registered. In the case of a libel the clerk recorded only the bare fact that 'A proponit contra B',[2] but in the case of a petition a summary of the claim was always included together with some phrase like 'prout articulatur et decreta copia' to indicate that the claim had been presented more fully in formal 'articles' and that copies had been ordered by the judge for the benefit of the defenders.[3] It is not quite clear what advantages or disadvantages there may have been in beginning an action by one or other of these methods, but once the action was under way there was no distinction in the form in which they were contested.

There may have been one possible advantage in proceeding by petition rather than by libel. Once a libel had been drawn up, it had then to be formally registered in the court record. This

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1. BP, ii, p.313.
2. See below, Appendix IV, p.355 . 'Proponit' comes from the operative phrase of the libel 'dico et propono in jure'.
3. See below, Appendix IV, p.355. Alternatively the phrase appears as 'prout latius articulatur ...'

accounts for the many short 'A v B' entries described above; it accounts also for the fact that whereas the details of a petition were recorded, it was only the fact of a libel having been presented that found its way into the Act Book. Registration was no doubt a brief formality but it was a very necessary one; a libel had no force until it had been registered. In one case in the Lothian court the official decreed letters against the defender for not answering to the libel, but the defender's procurator asserted in defence that 'by midnight last night the libel had not been registered'.[1] As this particular action does not appear again it would seem that this objection was upheld. In the case of a petition, however, the fact of its verbal presentation in court apud acta would have removed the need for any further registration.

Once the libel[2] had been registered a diet was assigned for the defender to make his reply - the diet known as 'ad respondendum'. The interval allowed to the defender to prepare his reply varied considerably, no doubt according to the complexity of the case and to the circumstances of the parties; the period of a week occurs more frequently than any other. The defender had three options open to him at the diet ad respondendum - apart, that is, from declining to appear. He might deny the libel, in which case the stage known as 'litiscontestation' was achieved and the

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1. Acta I, fo. 10v, Skaithmure v. Crawford.
2. For the remainder of this discussion of plenary procedure 'libel' will be understood to mean 'libel or petition'.

claim was put to the pursuer's proof; he might also deny it while at the same time bringing a libel of his own against the pursuer, in which case the two claims were subsequently heard contemporaneously as 'conventio' (the original libel) and 'reconventio' (the responsive libel); or he might raise an objection, or 'exception', against the libel.

(iii) Litiscontestation

The stage of litiscontestation was defined by Stair as a judicial contract between parties that the cause should come to its proper conclusion according to the proof or disproof contained in the action.[1] Once this stage had been reached the way was open for the pursuer to prove his libel according to the rules of plenary procedure. A diet might be assigned to him 'ad ponendum et articulandum' - that is to say, for him to produce his libel and go over each article (i.e. each separate point) one by one. This was by no means an automatic step and may well have been at the discretion of the judge, according to whether the individual points needed to be explained, perhaps for the first time, or whether they were sufficiently clear. It must be remembered that with a largely written procedure access to an adversary's documents was not always guaranteed; furthermore, although the defender would be aware of the object of the claim, it might be some time before he could obtain a clear idea of the grounds on which it

1. James Dalrymple, 1st Viscount Stair, The Institutions of the Law of Scotland, (1832), ii, bk. 4, tit. xl, pp.927-8.

was based. In one case of tortuous complexity that had already been running for well over a year the procurator for the defence protested in despair that he was quite unable to prepare any 'contrary articles' on which to base his case since all his efforts to obtain copies of the pursuer's articles had been in vain.[1]

The diet ad articulandum could be succeeded by one of two diets: it could be followed by an opportunity for the defence to reply to the articles,[2] although this is comparatively rare; or, more frequently, it would be followed by the diet 'ad publicandum' at which the grounds of the libel were formally published and made available to the opposing party. Once the libel had thus been formally presented and admitted to probation the pursuer could bring forward his evidence. Plenary procedure allowed the pursuer three court days (that is, three separate diets) in which to prove his claim;[3] it was not, however, obligatory to use all three and in practice the third was often declined.[4] There were three methods of proof open to him - oath, document and witness.

(iv) Probation by Oath

Formal oaths, as might be expected, played an important part in the proceedings of the ecclesiastical courts[5] and often

1. Acta I, fo. 308v, Blackstock b. Machane.
2. E.g. ibid., fo. 51r, Ker v. Lauson.
3. The terms were described as 'ad probandum pro primo', '... pro secundo', '... pro tertio'. The three diets seem to accord with English practice (cf. Woodcock, Canterbury, p.53; Hockaday, 'Gloucester', p.257).
4. E.g. Acta I, fo. 69r, Bassantyne v. Bassantyne.
5. As they did in the lay courts also (cf. D.M. Walker, 'Evidence', Scottish Legal History, pp.311-14).

proved decisive. In the Lothian court such oaths were used in two roles in particular. The first was the 'oath of calumny' (juramentum calumnie), which for long survived as a feature of Scots Law.[1] It was described by William Hay[2] as 'the oath sworn before litigation by the defendant, that he believes his cause is just, and by the plaintiff, that he believes his suit is just'.[3] Once demanded, neither party could refuse this oath without conceding the action as though by confession.[4] The oath of calumny was a regular feature of the Lothian court, but appears to have been so much taken for granted that no record of it appears in Acta I save the brief note 'the party having given his oath';[5] the Dunblane Acta is more specific, and regularly records that 'the oath of calumny was received.[6] The value of such an oath might seem limited to a modern observer, and certainly the oath of calumny must usually have been little more than a formality, but we should not underestimate the weight that could be attached to sworn oaths; in their second principal role in the official's court they could prove decisive.

This second application of the oath was in the 'oath of verity'. Either party could refer the truth of the matter under dispute, or of any part of it, to the oath of his adversary; if the

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1. Ibid., pp.312-13.
2. See above, 133n.
3. Hay's Lectures, p.341.
4. Cf. the practice recorded by Balfour (BP, ii, pp.359-60).
5. 'Juramento partis prestito' (e.g. Acta I, fo. 47r, Wauchop v. Wauchop).
6. 'Juramento calumpnie recepto' (e.g. Dunblane Acta, fo. 46r).

adversary gave his oath that his claim or defence was indeed true then by that oath he would have proved his case; if, on the other hand, he declined to give his oath then he had either to return the offer and put the matter to the oath of the first party, or to succumb in the action.[1] The strength of this device was that its terms would be readily understood and considered binding by the parties concerned; it was, as Bell described it in the nineteenth century,[2] a contract. In one action in the Lothian court the pursuer's procurator agreed to the proposal of the defender that the contents of the petition should be put to the pursuer's oath, and did so by formally 'accepting this proposition' (that is, the terms of the matter which were to be decided by the oath).[3] Such mutual arrangements opened the way for a speedy settlement of a dispute that might otherwise have been indefinitely protracted; it also made possible a type of summary procedure which depended entirely on referring a particular proposition to the oath of the other party. In the latter case, as will be shown,[4] it was frequently used and seems generally to have given satisfaction, but as a form of proof in plenary procedure it was not so popular. It is not perhaps surprising that a litigant who had expended much time and money in formally contesting a suit would be reluctant to hazard it all on the honesty of his adversary, but it remained a

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1. This procedure was not confined to the courts spiritual (cf. BP, ii, 360-3; Walker, 'Evidence', 311-12).
2. G.J. Bell, A Dictionary of the Law of Scotland (Edinburgh, 1838), p.376.
3. 'Acceptante hujusmodi relatione' (Acta I, fo. 113v, Pety v. Brown).
4. See below, 234-6.

useful recourse in actions where more substantial proof was in short supply.

(v) The Production of Evidence

More substantial proof was offered in the form either of documentary evidence or of the testimony of witnesses. There was surprisingly little reliance placed on documentary evidence in plenary procedure, in contrast to the situation in Canterbury where, it seems, 'documentary proof was common';[1] although many summary cases revolved around the production of testaments or of contracts, an occasion has yet to be found in Acta I of a plenary action being founded on documentary proof alone. It was more usual to produce both witnesses and documents together at the same diet. In the action of Edward Sinclair of Dryden against George Henrison of Fordell the first probatory diet saw the production by the pursuer of two witnesses, an instrument signed and sealed by a public notary, a precept of sasine under the round seal and the signature of the archbishop of St Andrews, and a second instrument signed and sealed by a different notary; at the second diet a further two witnesses were produced and the action then disappears from the Acta Book - possibly because the defender had no answer to the weight of evidence ranged against him.[2] At other times it might be the policy of the adverse party to attack the validity of a document so produced, and

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1. Woodcock, Canterbury, p.55.
2. Acta I, fos. 217v, 224r.

his could be done so long as the document in question had been produced purely as evidence and not as part of the claimant's title to pursue.[1] It should not be forgotten, however, that the pursuit of a plenary action involved a great deal of documentation and little verbal procedure; at any one time the quantity of papers in circulation must have been considerable, and it was only in the presentation of evidence that there appears to have been an old-fashioned preference for witnesses.

The use of witnesses in the church courts marked a significant departure from the old tradition of compurgation by which an accused man could assemble in court a prescribed number of witnesses of good standing who would be prepared to testify to the honesty of his character, and thus to the unlikelihood of his being guilty of the charge. It is probable that this tradition left a lasting prejudice in favour of assembling as many witnesses as possible to testify in a particular cause, but sixteenth-century witnesses gave evidence to facts, in accordance with modern practice. The point at which this development took place in the secular courts is obscure before the fifteenth century and can only be assumed to have followed the practice of the church courts,[2] where the evidence is much earlier. In an action brought by the monks of Paisley over the lands of Monachkeneran in 1233 there were two separate productions

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1. See above, 204.
2. Walker, 'Evidence', pp.304-5.

of witnesses at which specific questions were put to them concerning the disputed property, and answers taken as evidence.[1] This particular dispute was noted by Cosmo Innes as the earliest example of witnesses declaring on a point of fact[2] and, although the practice may not then have been universal, it certainly set the pattern for later development. One other 'modern' development in the use of witnesses is illustrated by the Dunblane Acta - the production of the 'expert witness'. An action was moved by the procurator fiscal of Dunblane against a chaplain for the alleged wounding in the arm of a layman. The layman concerned himself protested the chaplain's innocence and two doctors were produced who, having carefully examined the man, testified that they could find no trace of a wound on either of his arms.[3]

Witnesses were generally cited to appear in court on a certain day, in the same manner as the parties to a suit, and similar difficulties were encountered in enforcing their attendance. It seems to have been the practice in the civil jurisdiction to decree letters under 'greater pains' upon witnesses who had failed to appear on the appointed day, so that they risked being put to the horn if they failed a second time.[4] Acta I contains many references to 'letters' being decreed against contumacious witnesses,[5] and it

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1. Registrum de Monasterii de Passelet (Maitland Club, 1832; New Club, 1877), pp.166-7.
2. Innes, Antiquities, p.214.
3. Dunblane Acta, fo. 142r.
4. BP, ii, p.354.
5. E.g. Acta I, fo. 23r, Wardlaw v. Wauchop.

would seem that as in the case of other summonses made in the course of an action only one citation was issued.[1] This citation would contain the threatened penalty of suspension, or even of excommunication. On one occasion, after the decreet of letters of censure against some reluctant witnesses, two of them were received in court and formally absolved, although the record does not specify the penalty they had incurred. However, when a bearer of letters directed against witnesses in the action of George Hay against Lord Borthwick was attacked and relieved of his papers, it was definitely 'letters excommunicatory against various witnesses' that he was carrying.[2] As with the initial citation of parties, the summons of witnesses had to be properly carried out and it is possible that court officers were sometimes careless in their duties. It happened in one action that the demand for the decreet of letters against absent witnesses was opposed on the gounds that the execution of the summons had been false; the procurator was sufficiently confident of his allegations as to demand from the executing officer his oath that the summons had indeed been lawfully executed, but the officer declined to appear.[3]

Distance and expense, quite apart from personal inclination or the fear of intimidation, must often have discouraged the attendance of witnesses, and the strict application of penalties may

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1. See above, 201.
2. 'Litteras excommunicatoriales super nonullis testibus contumacibus', (Acta I, fo. 161v).
3. Acta I, fo. 226r, Ker v. Lauson.

have been no more than was absolutely necessary to enforce it. Concessions were made, however, to those who had genuine excuses for non-attendance: a notary might be detailed to go and examine someone who, either on the grounds of sickness or the eminence of his position, could not be expected to appear in court;[1] or, if the witnesses lived at too great a distance from the court, the official might send a request to a local commissary that the examination should be carried out in situ.[2] The commissary would be requested to examine the witnesses according to 'the articles and interrogatories' which would be sent from the court and to return the depositions in confidence.[3]

When the witnesses did appear on the appointed day they were required only to be admitted and sworn in the presence of the court, and the Act Book records only that the oath had been given.[4] They would then be assigned a time for examination, probably in the afternoon at the end of the daily session,[5] which would be carried out in private without party or procurator being present, according to the requirements of the canon law.[6] The examination was based on

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1. Or both considerations might apply, as in the case of the witness who was 'egregia persona et infirmata' (ibid., fo. 43v, Lindsay v. Borthwick; cf. also ibid., fo. 59r, Brown v. Pety).
2. E.g. SRO, Morton Papers, GD150/1735.
3. Cf. St A. Form., i, 259, 262.
4. I.e. 'juramentis prestitis'. This phrase was invariable after the production of witnesses. The form of the witnesses' oath would probably have been very similar to that given by Balfour (BP, ii, 373). We talk of witnesses rather than 'witness' since no case has yet been found which relied on the deposition of only one witness; according to Balfour, 'probatioun allanerlie be ane witness, is not sufficient of the law (BP, ii, 373).
5. See above, 99.
6. Bisset's Rolment, iii, 143.

'articles and interrogatories': that is, the commissary or notary detailed to make the examination framed his first set of questions according to the points contained in the articles of the libel; when the resulting depositions had been taken down and signed, the cross-examination was conducted on the basis of a second set of questions, or 'interrogatory', which had been drawn up by the procurator of the adverse party. It was obviously important that the defender's procurator be fully acquainted with the grounds of the pursuer's claim, since without them he would be unable to compose an effective interrogatory, and complaints that the articles were being witheld are a regular feature of the Act Books.[1] Generally, however, the examination of the witnesses proceeded without dispute; once all the depositions had been taken a diet was assigned 'ad publicandum producta' at which the results of the examination and and cross-examination, so far known only to the examiner, would be made public in court.[2]

When the pursuer had produced all his proof and formally published it in court a diet was set 'ad opponendum' at which the defender could lodge any final objections against the claim or the evidence produced in its favour.[3] (It must be remembered that in the case of an uncomplicated contest of the principal libel the

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1. E.g. Acta I, fo. 24r, Gould v. Thayne. Cf. also above, 208.
2. E.g. ibid., fo. 76r, Ker v. Lauson.
3. E.g. ibid., fo. 34v, Hamilton v. Hamilton.

obligation was for the pursuer to prove his case and for the defender to object to it, but not to produce a case of his own. If the defender had chosen to answer the original libel by producing a reconvencio, or counter-claim, he would have had an equal opportunity to prove it, with his own diets for proof etc.). The objections raised at the diet ad opponendum seem usually to have been little more than a formality. The Latin phrase which occurs regularly at this stage of an action was 'procurator objecit generaliter objectiones juris',[1] but it might also be the case that the defending party declined to make any use of the diet at all; in the latter case the pursuer's procurator would apply to have the diet 'circumduced', which meant effectively that the diet and the matter assigned to it lapsed, and the case proceeded to the next stage.[2] In either event, and this suggests that the statement of 'general objection' had only formal significance, the case would then proceed to the penultimate diet, 'ad concludendum'. On occasion, however, the objections raised at the diet ad opponendum were clearly of greater substance. As usual the nature of the objections was not recorded in the Act Book; the entry might read just 'objections were produced',[3] although it was once noted that the objections arose from the depositions of the witnesses.[4] In this event the objections clearly had the same value as exceptions: a

1. E.g. ibid., fo. 34v, Hamilton v. Hamilton.
2. E.g. ibid., fo. 119r, Newton v. Scott. This could be applied to any diet which the appropriate party failed to utilise, and generally the case would proceed smoothly to the next diet. The invariable formula was 'procurator protestabatur quod cederet sibi pro termino'.
3. 'Objectionibus productis' (e.g. ibid., fo. 52r, Wardlaw v. Wauchop).
4. Ibid., fo. 56r, Gould v. Thayne.

term was assigned for the other party to state his position and then the validity of the objections would be decided by an interlocutory decree of the judge. If the objections were deemed acceptable the way was open for a new and distinct contest on them alone,[1] but if they were rejected the action would be resumed where it had been interrupted and would proceed ad concludendum.[2] This penultimate diet left very little mark in Acta I; generally 'concluso' is all that appears, so it is not clear whether this diet provided an opportunity for the parties to sum up their relative positions or whether it was merely for the judge to pronounce the formal conclusion of the case. In either case, once the action had been formally concluded, no further evidence or submissions were admissible and a diet was assigned 'ad sententiandum', for the pronouncing of sentence.

Before we go on to consider the part played by exceptions in plenary procedure, it may be useful if we pause here and briefly summarise the stages of an action so far considered. When a libel had been registered and the parties cited to appear, a diet was assigned to the defender to make his answer to the pursuer's claim (ad respondendum). If he chose to contest the action he would deny the libel and the case would procede to litiscontestation. The pursuer might then use the diet ad articulandum to set out exactly

1. E.g. ibid., fo. 52r, Wardlaw v. Wauchop. The action would then proceed in the same way as for an exception (see below, 225), but the objections were termed 'oblata'.
2. As happened in the action of Gould v. Thayne (ibid., fo. 61r).

what he intended to prove in the libel which could then be formally 'published' in court (ad publicandum). Three probatory diets were then available to the pursuer, during which he could produce evidence on behalf of his claim in the form of oath, document or the deposition of witnesses. This evidence was then also made public and the defender was given an opportunity to introduce any final objections before the action was formally concluded by the judge. Such were the bare bones of plenary procedure, and if there had been no more to it than that the Act Books would be very much shorter and very much easier to follow.

(vi) Exceptions

The procedure outlined above clearly assumes one thing - that the defender would have been content to allow the pursuer to present and prove his libel unhindered; for a variety of reasons this was sometimes the case. More often, however, one or more exceptions were introduced by which the entire action might be nullified, or by which the defender could seize the initiative in the suit. English sources have already suggested that much of the time of an ecclesiastical court might be taken up with exceptions, and this was certainly the case in the Lothian court where almost every seriously contested action involved the introduction of exceptions.[1] In general, and according to the usual practice of

1. The case of Newton v. Scott (see above, 217n) was one example of a contested action that did not involve exceptions.

the Act Books, no details are given beyond the brief note that 'exceptions were produced',[1] and we are obliged to turn to Balfour for guidance on the various forms they could take.

Balfour distinguished two types of exception - dilatory and peremptory. A dilatory exception, as the name suggests, served merely to delay the action and did not reflect on the basic validity of the claim; it might itself be divided into two categories - declinatory, or 'recusatory', exceptions and dilatory exceptions proper. Declinatory exceptions were made against the competence of the judge or the validity of the court, or they presented some other reason that would make the action incompetent at that time and place, while a dilatory exception could postpone an action until the claim became relevant, such as 'quhen ony man cravis his debt befoir the time'.[2] All dilatory exceptions had to be proposed before litis-contestation took place, with priority being given to dealing with declinatory exceptions.

A similar application of dilatory exceptions is to be found in the church court records. In 1543 the Earl of Bothwell's divorce action against his wife was remitted to a special commission after the countess had successfully proposed 'a number of recusatory

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1. 'Productis exceptionibus' or 'producta exceptione' (e.g. ibid., fo. 14v, Meldrum v. Hepburn).
2. BP, ii, 343. Balfour's discussion of exceptions may be found ibid., ii, 343-9.

exceptions against the official in the diet assigned to answering the libel'.[1] She had in fact alleged that the judge, Abraham Crichton, was related to her husband. This exception had been raised right at the beginning of the action, but it may have been possible to lodge a declinatory exception at any stage of a suit. Certainly no such latitude was extended to an ordinary dilatory exception; this much was made clear by a Lothian court procurator who pointed out that, according to the 'statutes' of the court, 'all dilatory exceptions should be proposed at the first diet'.[2] In another action, however, the defenders' procurator attempted to have his clients repledged to the court of the exempt jurisdiction of St John of Corstorphine, and produced declinatory exceptions against the court (exceptiones fori declinatorias). These exceptions were not produced until the diet ad opponendum and the pursuer's procurator claimed that, having carefully examined the matter, he found the exceptions to be not truly declinatory but merely dilatory, and that on those grounds they should have been proposed at the very beginning of the action (ante omnem litem).[3] The inference seems to be that if the exceptions had been properly declinatory they would have been admissible at that late stage.

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1. 'In hujusmodi termino assignato ad respondendum hujusmodi libello nonulle exceptiones recusatorie contra prefatum nostrum officialem' (St A. Form., ii, p.236).
2. 'Respectu statutorum presentis curie per que proponi debent omnes dilatorie in primo termino' (Acta I, fo. 65r, Hamilton v. Douglas).
3. Ibid., fo. 52v, Makinath v. Polwarth and West.

One of the exceptions which could, according to Balfour,[1] certainly be proposed at any stage was the exception of the ineptitude or irrelevancy of the libel. That this was also the case in the official's court can be confirmed from Acta I where a procurator is recorded declaring that 'by law the exception of ineptitude may be raised at any point of an action.'[2] It was a ruling that was clearly open to some abuse. It was frequently the case that at the stage of litiscontestation, which involved the formal acknowledgement by the defence of the legality of the libel (though not, of course, of the claim it contained), the defending procurator would reserve his 'just defences'; occasionally it was spelt out more explicitly as 'saving the impertinence, irrelevance and generality of the libel'.[3] This conditional acceptance of the libel probably expressed no more than a well-understood principle, but it allowed the defence considerable flexibility. The definition of an 'inept' libel was, as one might expect, not easy to pin down. This is well illustrated by the action brought by Thomas Cochrane against Walter Loutefute and his wife concerning the effects of the late Marion Cochrane, a former servant of Loutefute. Loutefute proposed a reconvencio, or counter-claim, which Cochrane referred back to Loutefute's oath of verity. The oath was duly given and it would have seemed that Cochrane had lost the action. However, Cochrane's procurator then alleged that the

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1. BP, ii, p.348.
2. 'De jure exceptio ineptitudinis in quacumque parte litis opponi potest' (Acta I, fo. 277v, Cochrane v. Loutefute).
3. 'Salvis impertinencie irrelevancie et generalitate libelli' (ibid., fo. 46r, Wauchop v. Wauchop).

sum of six pounds alleged in the reconvencio to have been expended on Mariot when she was ill was inept because the Loutefutes, having hired the woman for a regular wage, were obliged to provide for her in sickness as in health; arising from this, the procurator argued, the whole reconvencio would have to be declared inept.[1] Unfortunately the action went no further, so we cannot discover how this bold assertion impressed the official, but it is difficult to escape the conclusion that the 'just defences' were reserved as a last resort.

It is with Balfour's second category, that of peremptory exceptions, that the court records are most usually concerned. In the lay courts a successful peremptory exception totally disposed of the libel, but certain rules had to be observed: no exception could be admitted that was in flat contradiction of the libel; no exception could be admitted after the libel had been put to the pursuer's probation; an exception against the summons had to precede an exception against the pursuer's claim, since the latter implicitly acknowledged the validity of the summons.[2] Once again, the procedure recorded by Balfour seems to have differed little from that followed in the court of the official of Lothian. Peremptory exceptions were generally proposed at the diet ad respondendum libello and referred either to the citation or, more usually, to the claim. Most of the proceedings took place outwith the records and

1. Ibid., fo. 277v.
2. Cf. BP, ii, pp.343-9.

so we have to reconstruct their progress from the brief notes left at each stage. Thus an exception of 'the nullity of the process' was dismissed 'in respect of the summons',[1] suggesting that a question of the validity of the original citation had been raised and rejected. Other exceptions were dismissed, more obscurely, 'in respect of the libel' or 'in respect of the petition',[2] which suggests that it was some aspect of the claim that had been held in question. Very often, as we suggested earlier,[3] the exception can have revolved around little more than a quibble, and the hasty addition of a few words to the libel would have been enough to circumvent it.

(vii) Answers to an Exception

In the case of more serious exceptions being raised by the defence the pursuer's procurator could deal with them in one of three ways: he could offer some reason why the court should reject the exception; he could deny it, and oblige the defender to produce proof; or he could make a formal reply (replica) to the points contained in the exception. Leaving aside for the moment the question of the replica, we will consider together the first and second alternatives which shared a broadly similar procedure.

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1. 'Exceptio nullitatis processus', 'respectu citationis' (Acta I, fos. 35r, 58v, Hamilton v. Douglas).
2. E.g. ibid., fo. 10v, Guld v. Thayne.
3. See above, 204.

Once the exception had been produced a diet would be assigned for the pursuer to answer it, a diet 'ad respondendum exceptioni', and if his procurator felt that the exception was for some reason invalid he could propose to the judge that it should be rejected. This would be recorded simply as 'the procurator said that the exceptions should not be admitted' (admitted, that is, to proof), adding perhaps 'in respect of the libel'. The matter would then be up to the discretion of the judge who would set a diet 'ad interloquendum' at which he would give his decision in an interlocutory decree.[1] If, after due deliberation, the judge rejected the exception the action would revert to the diet ad respondendum libelli and to the consideration of the original claim;[2] if the judge admitted the exception, either in whole or in part,[3] a diet would be assigned for litiscontestation on the exception. In the latter case the same stage was thus achieved as if the pursuer's procurator had chosen the second alternative open to him and had simply denied the exception at the outset, challenging the defender to prove his exception.[4] Once an exception had been admitted to probation it was contested in precisely the same way as the original claim over which this secondary action now took precedence, since proving the exception would invalidate the original libel. The new contest differed only in that one diet alone was allowed for the

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1. An 'interlocutory decree' was a judicial decision that settled any question that arose during the course of a suit (cf. below,237-8).
2. E.g. Acta I, fo. 32v, Sinclair v. Henrison.
3. E.g. ibid., fo. 15v, Hamilton v. Hamilton, (see Appendix IV, p.368) where the judge accepted the first only of a number of exceptions.
4. E.g. 'procurator negavit exceptionem et super illa lite contestata' (ibid., fo. 56v, Sinclair v. Henrison).

proof of an exception, the diet 'ad probandum peremptorie', but the proof was produced and published in the same way, and the same diet was allowed to the other party ad opponendum before the action was concluded.[1] In such cases the respective roles of the parties were reversed and an action that began as 'causa Lauson contra Ker' became in the Act Book 'causa exceptionis Ker contra Lauson'.

The majority of peremptory exceptions offered in the official's court were exceptions against the libel and were, as in the lay courts,[2] produced at the diet ad respondendum libello. Exceptions were not, however, confined to this diet; occasionally exceptions were lodged against the production of witnesses, although in view of the many categories of person that were listed by Balfour as incompetent to bear witness[3] this does not seem to have been as frequent an occurrence as might be expected. One example occurred in the Lothian court in 1543 when John Carkatill of Finglen lodged exceptions against both the witnesses that had been produced and against their depositions; the official rejected these exceptions by interlocutory decree but Carkatill appealed to the official principal in St Andrews against the decision, and his claim was upheld.[4] At certain times also an irregular exception (exceptio anomala) appears to have been admissible. It is not clear what precisely constituted

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1. The case of Hamilton v. Hamilton provides a good illustration of the contest of an exception (See below, Appendix IV, pp. 367-70).
2. BP, ii, p. 346.
3. BP, ii, pp. 377-8.
4. Sent. St A., fo. 45r.

such an exception nor what were the grounds on which it might be admissible; on one occasion an irregular exception was admitted after the defender had already proposed one group of exceptions and had seen them dismissed by the judge, so it is possible that some particularly pertinent objection might, at the discretion of the judge, be admitted after the proper diet for exceptions had elapsed.[1]

An exception did not necessarily rebut the whole of the pursuer's claim, it might merely seek to modify the term of the libel. In one claim in the Lothian court the sum of three guineas was pursued as the purchase price owed on a quantity of malt; the defenders admitted both the purchase and the receipt of the goods but objected that the malt had been 'insufficient', and litis-contestation followed on the 'exception of insufficiency'. The defenders were finally adjudged to pay the sum of fifty-seven shillings which no doubt vindicated their exception in principle at least.[2]

Thus the libel and the exception provided the two chief elements of plenary procedure - the principal and the subsidiary action, each with its own contest and probation. At this point some variations on the form of the subsidiary action should be noted.

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1. Acta I, fos. 27r, 32v, 38v, Sinclair v. Henrison.
2. Ibid., fos. 24r, 29v, Scott v. Glen and Napier.

We have already seen how, at the stage ad opponendum, objections could be raised by the defender which would have the same force as exceptions and which could lead to a similar contest.[1] Litis-contestation could also take place on the basis of pleas known as 'jura'. It is difficult to define precisely the nature of these pleas; when they occur in the statutes as 'omnia jura'[2] they are translated by Patrick somewhat ambiguously as 'all legal pleas'.[3] The evidence of Acta I suggests that jura took the form of written submissions which introduced not so much objections but facts which might alter the circumstances of the action. In the case of Douglas v. Falsyde the sum of eight crowns was claimed as owed in an obligation which the pursuer produced in court; at the diet ad respondendum petitioni the procurator for the defence admitted the contents of the obligation but said nevertheless that the sum should not be paid 'on account of pleas and reasons that will be offered' (propter jura et rationes dandas). The next diet, at which these reasons were to be given, was termed 'ad porrigendum jura'; the jura being duly produced, the pursuer's procurator accepted what they contained but declared that they were not relevant to the particular terms of the petition.[4] The term 'porrigere' (with its particular implications of delivering documents) together with the delay allowed for the production of the jura both suggests a procedure

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1. See above, 217-8.
2. SES, ii, p.125.
3. Patrick, Statutes, pp.131-2.
4. Acta I, fos. 14v, 17v, 18v, 20v. Cf. also the case of Hume v. Machane, where the jura were offered in explanation of a plea for absolution (ibid., fo. 8v).

different from that of the regular production of exceptions which took place immediately at the diet ad respondendum. It is clear also that they involved an approach somewhat different from that of a simple objection. It is interesting to note, however, that their 'value' in an action was seen as effectively that of an exception. Thus although Acta I records what were known as cause jurium,[1] on one occasion the phrase 'jura sive exceptiones' is used to describe what in the previous diet was termed 'jura et defensiones',[2] while a modified exception appears elsewhere as 'jura reformata'.[3]

This device of introducing what was perhaps a new approach to the matter in dispute was also open to the pursuer. The third of the three possible means of answering an exception that we noted earlier[4] was the 'replica'; the use of this plea was the same as that of the defence's jura and it fortified the pursuer's claim in respect of whatever had been alleged by the defender's exception or jura. It was a process which allowed both parties considerable room to manoeuvre. The replica might be followed by a diet 'ad duplicandum' in which the defender could present a 'duplica' in support of his exception or jura, and by further diets 'ad triplicandum' and 'ad quadruplicandum' on the principle that each side acknowledged the position of the other side but introduced new points

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1. E.g. ibid., fo. 9r, Hume v. Machane.
2. Ibid., fos. 26v, 28r, Logan v. Acheson et al.
3. Ibid., fo. 15v, Gould v. Thayne.
4. See above, 224.

or arguments in support of its own case.[1] One action which followed this course in the Lothian court was eventually designated as a 'causa jurium principalium replicantium duplicantium et triplicantium' but at that stage the defender lost heart and at the diet ad quadruplicandum offered no further pleas in support of his jura and duplica, but instead opposed the admission of the triplica; the case went to an interlocutory decree by which the jura replicantia were admitted and the action was finally contested as a 'causa replice' - effectively the original claim of the pursuer with some additions.[2]

By such means could a plenary action, with its essentially straightforward procedure, be contested in great detail and at great length. The case last cited, that of Andrew Blackstock against the executors of his wife's grandfather, is a striking example of this. The pursuer was himself a procurator of the court[3] and this may have accounted for the fact that the action occupied twenty-three separate diets over a period of six months and then, after a pause and the introduction of a new petition, ran for another twenty-one diets before finally disappearing from the pages of the court records, no nearer settlement than it had been when it was begun eighteen months earlier.

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1. Cf. Reichel, Canon Law, ii, p.286; a similar procedure is described in Bisset's Rolment, i, p.183.
2. Acta I, fos. 8v, 10r, 11r, 11v, Machane v. Blackstock.
3. See above, 123.

2. SUMMARY PROCEDURE

The rules of plenary procedure applied to suits by both libel and petition, but a claim by petition could equally well be contested by a contracted or summary procedure, and this will now be considered. There do not seem to have been any clear rules concerning which cases should be heard summarily. The statute of 1549 that was concerned with church court procedure laid down specifications for a summary process which was to be used in all actions where the value of the money or goods at stake did not exceed twenty pounds,[1] but this was clearly not the practice in the Lothian court during the period covered by Acta I. The Dean of Christianity of Haddington was pursued for the sum of ten pounds by plenary petition in 1546,[2] and a similar process was invoked to recover seven pounds from the executors of one Christina Burne.[3] Clerics and the religious houses seem to have favoured a summary procedure when pursuing laymen, although this may have been more of a consequence of the difficulty of obtaining the appearance of the defenders in court.[4] Petitions for specific purposes such as the transfer of a contract or the appointment of executors could also be settled quickly in this way.[5] It may have been that the final decision as to how a cause should be heard was left to the judge; if it had been left to the procurators each action might have lasted as long as that of their colleague, Andrew Blackstock.

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1. SES, ii, pp.124-5.
2. Acta I, fo. 27v, Adamson v. Myll.
3. Ibid., fo. 22v, David v. Cairns.
4. See above, 163. Cf. also, Acta I, fo. 23v, Logan v. Acheson et al.; fo. 10v, Newbattle Abbey v. Watson et al.
5. E.g. ibid., fo. 29r, Spens v. Dischington; fo. 26r, Abernethy v. Bishop.

The precise form of a summary process could also vary, but in general the principles of plenary procedure were followed in a condensed form. Thus in one case, after a petition for the transfer of a contract to a widow of one of the original parties had been produced, a diet was assigned 'ad respondendum et proponendum omnes' at which the defender had both to answer and produce all his defences.[1] If the petition was denied it was admitted to probation for which the one diet ad probandum peremptorie was allowed, as in the case of an exception. Following this diet of proof a further diet, 'ad opponendum et proponendum omnia impedimencia', was allowed to the defender before the action was concluded in the usual way. This sequence was far from invariable. The importance of the recommendations of the council of 1549 was that the form of summary procedure laid down in the statute was one that could be employed if the defending party refused to appear; but in the Lothian court this only confirmed what seems in fact to have already been the practice. The statute provided that in the event of a defender not appearing the petition should be presented and a diet set for 'articulation' and proof (ad articulandum et probandum). In the action of the priory of St Andrews against Lord Seton and his tenants in October 1546 this is precisely what happened. The sub-prior, John Wynram, appeared and presented his petition; then, since 'no one else had appeared', a diet was set ad articulandum et probandum[2] while the defenders were cited again under the pain of

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1. Ibid., fo. 13v, Ker v. Henrison.
2. See below, Appendix IV, 363-4.

contumacy. The second stage in the statute allowed for the production of proof and for a diet to be set in which the defenders could plead against the petition, albeit that they had still not appeared. This follows exactly the course of the second stage of Wymram's action, at which the defenders were also cited for contumacy.[1]

- It is clear that no precise rules for the sequence of summary processes can be laid down. This is not so surprising if we briefly recall the earlier proposition that, to the sixteenth-century lawyer, there was essentially only one form of procedure.[2] Summary procedures merely utilised the principles of plenary procedure, but abbreviated as convenient. It was possible to contest a suit by an even more abbreviated form than those of the two cases just cited; for example, the production of a petition could be followed immediately by a diet in which to prove it.[3] There was, however, one major weakness in this potentially invaluable device for expediting the contest of court actions: summary procedure was just as vulnerable to the introduction of exceptions as was plenary procedure.[4] The Rector of Restalrig was one of many

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1. See below, Appendix IV, 364 . The statute described the diet as 'ad dicendum contra producta, necnon ad propendum omnia jura'; it appears in Act I in the more abbreviated form 'ad opponendum et proponendum omnes'.
2. See above, 198. Thus, although a summary cause could contain any number of plenary elements, a cause could not be abbreviated once it had begun a plenary process: 'if in a plenary cause any one proceeds summarily, the proceedings are null and void from the commencement, because it is ultra vires for the judge to dispose of them summarily. If, on the contrary, in summary causes the proceedings are plenary, such proceedings are valid and binding' (Reichel, Canon Law, ii, 238-9).
3. E.g. Acta I, fo. 10v, Newbattle Abbey, v. Watson et al.; fo.15r, Bissat v. Liston.
4. See below, Appendix IV, 370-1.

who discovered this to his cost when he brought a summary petition against six of his parishioners for the unlawful occupancy of land belonging to the church. On presenting his petition the rector was immediately assigned a diet ad respondendum et proponendum omnes and, since the defenders had not appeared, a diet ad ponendum et articulandum et probandum peremptorie as well. However, at this second diet the defenders did appear and their procurator, explaining that his clients had not been sure of their defences until that point, produced exceptions.[1] The case then went to an interlocutory decree, another exception, replica and duplica, and finally to another interlocutory decree before the principal petition was again considered. The use of summary procedures was not itself any defence against a determined lawyer.

The potential delays of both plenary and summary procedure may account for the popularity of the second form of process which may be termed 'summary'. The contest of a claim by a cedula[2] also derived, like the summary petition, from plenary procedure - in this case from the principle of the oath of verity.[3] The pursuer petitioned his adversary 'prout in cedula danda', that is, according to the terms of a short document that would subsequently be delivered to the defender (but which was not recorded in the Act Book). The defender was then cited to a diet 'ad jurandum' at which he gave his

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1. Acta I, fo. 26v, Logan v. Acheson et al.
2. See above, 198.
3. See above, 210.

oath on the contents of the cedula.[1] Unless he wished to admit the pursuer's claim, the defender would either swear that the contents of the document were false, and so end the matter,[2] or he could refer the matter back to the oath of the pursuer.[3] A cedula was open to exceptions at the stage ad jurandum but not thereafter since, as with the oath of verity, the acceptance of the terms of the claim as a basis for the oath of either party was considered a binding contract. As with any form of decisive oath the value of this form of procedure must be open to question. Certainly it was a popular method of settling disputes; of the 256 actions initiated between October and December 1546 eighty-five were presented in the form of cedule. Numbers alone might indicate no more than that the prospect of a cheap and speedy termination of a dispute might have offset any doubts as to the justice of it, but the evidence does suggest that the cedula could prove effective as well as quick. When Mariot Thomson petitioned Mariot Cass for a linen handkerchief, the defender 'swore that she did not have it, or know anything about it',[4] and there the matter ended. Undeterred, Thomson presented a new cedula to the widower of the woman who was supposed to have left her the handkerchief in her will; this time the shot found its mark and, faced with giving his oath, the man confessed and handed over the object in question.[5] Other examples

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1. E.g. Acta I, fo. 38r, Cairns v. Smyth.
2. E.g. ibid., fo. 42r, Cairns v. Smyth.
3. E.g. ibid., fo. 32v, Bathgate v. Jackson.
4. 'Juravit quod non habet nec premissa novit' (ibid., f. 28v).
5. Ibid., fo. 28v, Thomson v. Cranston.

demonstrate an equally speedy settlement of disputes, and if both parties were present a cedula could be presented and decided within the space of a single diet.[1]

A pursuer whose claim had thus been denied on oath by his adversary might not always have been satisfied with the outcome of this sort of process, but it was clearly held to have been as decisive as any other. When Mariot Doby claimed a legacy from William Bishop by means of a cedula she was clearly not content when Bishop denied the claim on oath. She then presented a petition against him in which she claimed the same legacy and Bishop raised an exception against it; the outcome was that the exception was admitted to proof and Bishop produced the fact that the claim had already been denied on oath, and the action came to an end.[2] Petitions could be quite legitimately substituted for cedula after the initial claim had been registered, but it had to be done before the defender gave his oath otherwise it would meet the same fate as Mariot Doby's claim.[3]

Thus by libel, by petition and by oath, instance suits were contested in the official's court. There remains one further factor to discuss, one that was common to all types of case and which has been mentioned already in passing - the intervention of the

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1. E.g. ibid., fo. 38r, Thomson v. Wauchop.
2. Ibid., fos. 24v,27v,31v,33v,34v,55v,103r,113v.
3. E.g. ibid., fo. 20r, Kernington v. Farrar.

judge. Whenever a party or his procurator rejected an exception or some other defence without actually denying it[1] the case was taken into the judge's consideration and he would declare whether the exception was to be admitted. In this event the suit was recorded as passing 'ad interloquendum' or 'ad avisandum'; the latter term is one that survived in the later development of Scots law,[2] but there does not seem to have been any significant distinction between the two, as they appear frequently interchangeable.[3] The precise problem which was thus referred to the judge is seldom indicated in the Act Book, but one example occurred where the defending procurator objected that his client's oath on a cedula could not be demanded until the death of the pursuer's husband (on which the claim was founded) had been proved; the principle that the judge had to consider in reference to that case was stressed for him by the procurator - that a person was always presumed to be living until it was proved to the contrary.[4] The decision may often have been straightforward, but sometimes the judge's knowledge would have been severely taxed. The occasion on Christmas Eve 1546 when the commissary confessed that the matter was too difficult for him[5] was the result of the action being referred to him ad avisandum. The judge's decision was given in the form of an interlocutory decree which was as decisive as a definitive sentence. If the judge

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1. E.g. 'procurator dixit exceptionem minime admittendam'. Cf. above, 225.
2. Cf. Bell, Dictionary, 77.
3. E.g. Acta I, fos. 102v,107v,115Av, Bassantyne v. Bassantyne; fos. 200v,203v, Wardlaw v. Wauchop.
4. E.g. Acta I, fo. 33r, Cunningham v. Clapperton.
5. See above, 108.

rejected the exception, the suit reverted to the stage it had reached when the exception was first proposed, usually the stage ad respondendum libello;[1] if he upheld it, the exception went to probation,[2] and if successful it would decide the case in favour of the defender. In either event an appeal could be made from an interlocutory decree to the court of the official principal.

The logical conclusion of an instance suit should have been a sentence given in favour of one or other of the parties, but of the 256 cases begun in our period only four in fact achieved a settlement. This is a very small proportion, even considering that 104 of the actions never got beyond the initial registration, but it is not unrepresentative of Acta I as a whole.[3] The implication of why so few cases came to sentence will be considered later,[4] but we can note at this point the occurrence of the sentence in the Act Book. Once the case had been concluded, the judge assigned a diet 'ad sententiandum' at which the formal sentence was given in the presence of the parties concerned and of a number of witnesses, usually drawn from the court procurators. The terms of the sentence were not recorded in the Act Book itself since they would be written up in the Sentence Book; thus in the action of George Hay against Lord Borthwick the fact of the sentence was noted in the Act Book, but we have to turn to the Sentence Book to discover the terms of

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1. E.g. Acta I, fo. 17r, Meldrum v. Hepburn.
2. E.g. Acta I, fo. 33v, Kiltray v. Hesliop (see below, Appendix IV, 371).
3. Only twenty-nine sentences were recorded during the twenty-nine months covered by Acta I.
4. See below, 295-7.

the judgement and, indeed, against whom it was made.[1] One further diet might be assigned for assessing the costs of the suit (ad taxandum) but this does not always appear nor, when it does, do we always find that the actual sum was written down.[2]

Occasionally the alternative fate of a suit was recorded.[3] An action could be settled by the amicable compromise of the parties, or it could be submitted to arbiters, but for the majority of cases undertaken in the official's court there was a beginning, sometimes a middle and no end. We cannot assume that only those cases which reached a recognisable conclusion gave satisfaction, nor that all the other litigants who took their hopes and grievances to the ecclesiastical court did so in vain.[4] In many cases it must have been enough to vindicate a principle when a libel was admitted to probation, or when an exception was upheld, and a settlement would then have been possible 'out of court'. On occasion the mere registration of a libel seems to have done the trick, being followed by a confession from the defender and a monition from the judge. Nor should we assume that the system of exceptions was solely to blame, since actions were abandoned almost as often where no exceptions had been produced. Exceptions were certainly responsible for the almost indefinite protraction of many cases, and as such

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1. Sent. Laud., fo. 331v.
2. E.g. Acta I, fo. 440v, Hay v. Borthwick. Cf. also below, 298-9.
3. See below, 295-6.
4. See below, 296-7.

represented a grave obstacle to many would-be litigants in terms of both time and money; but the strength of the officials' court lay in the existence of a highly flexible procedure alongside the more cumbersome plenary process, and in the existence of simple forms of contest by which disputes could be settled with relative speed and economy.

APPELLATE JURISDICTION

APPELLATE JURISDICTION

The existence of appellate jurisdictions always bring a note of uncertainty into the function of any court. There is little profit in a court providing an effective and speedy judicial process if its sentences are to be challenged and overturned on appeal, yet appeal systems are almost as old as courts of law themselves.[1] So far as the records of the officials' courts are concerned there were two principal types of appeal: appeals made from the courts of diocesan judges to the official principal,[2] and appeals made from the principal's court to the papal court in Rome.

1. DIOCESAN APPEALS

The appointment of John Weddel as official principal[3] gave him authority to hear appeals both from the officialis foraneus of Lothian and his commissaries and from the suffragans of the Archbishop of St Andrews and from their officials and commissaries.[4] In practice the court of Lothian accounted for much the largest single group of appeals made to the official principal, but the principal's Sentence Book also records appeals from each of the eight dioceses in

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1. The appeal system of the church appears to have been adapted from Roman law as it developed under the Republic (Sayers, Judges Delegate, 2).
2. These will be referred to as 'diocesan appeals'.
3. See above, 70.
4. St A. Form., i, 31-32.

the province of St Andrews; appeals from the province of Glasgow were not normally entertained by the official principal.[1] During the period covered by the Sentence Book the official principal decided sixty-one appeals from the Lothian court and a further seventy-nine which originated in the courts of the provincial dioceses.[2]

Those who were discontented with a judicial process did not have to wait for the conclusion of the action and the passing of a definitive sentence before lodging an appeal; an appeal could be made from any judicial decision, or interlocutory decree, made during the course of a suit and which might be alleged to have done an injury (gravamen) to one or other of the parties. One example was the appeal against a decision of the commissary of Moray who had refused to admit certain witnesses at the diet assigned for the proof of an exception;[3] an appeal from the Lothian court, on the other hand, was made against the decision of Abraham Crichton not to admit a particular exception.[4] Nor were appeals necessarily confined to contested causes. It may sometimes have been the case that a party was 'acted' in the books of a court on terms to which he was not prepared to agree; the Sentence Book preserves an example of an appeal, upheld by the official principal, against an act of

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1. See below, 253.
2. See below, Appendix III, 350-1.
3. Sent. St A., fo. 225r. The appeal was upheld. Another appeal from Moray alleged that the commissary general had refused to administer justice in the cause brought before him (ibid., fo.106r).
4. Ibid., fo. 45r.

monition done by the official of Lothian 'without the hearing of any cause'.[1]

In canonical terms appeals from interlocutory decrees were distinguished from appeals from definitive sentences in four principal ways. They did not suspend the jurisdiction of the inferior judge, unless the superior expressly granted an inhibition; they were automatically annulled if the terms of the interlocutory decree were altered; they had always to be in writing and to specify the precise grounds of the appeal, whereas an appeal could be made orally in court against the terms of a definitive sentence; and they could be sustained on the grounds specified in the appeal, new material being inadmissible.[2] It was also ruled by the Scottish statute of 1549 that no appeal against an interlocutory decree could be referred to a superior judge unless it was based on a relevant point of law, and that the superior judge should grant no inhibition against the inferior until the formal letters of appeal (apostolos) had been received.[3] In practice, however, the records make little distinction between the two types of appeal, and the procedure involved seems to have been broadly similar.

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1. This case serves to emphasise the fact that an act of monition was only valid when both sides consented to the terms. If there was any dispute between the parties, it would have had to be settled before the agreement could be acted.
2. Cf. Reichel, Canon Law, ii, 327-8.
3. SES, ii, 126.

The lodging of an appeal in the Lothian court was unfortunately not recorded in the Act Book, but surviving notarial records have preserved an account of an appeal made by Nicholas Ramsay of Dalhousie against a sentence pronounced by the official of Lothian in 1535.[1] Ramsay's procurator, Andrew Blackstock, first of all requested the grant of apostolos which were letters issued by the judge a quo (that is to say, the judge from whom the appeal was being made) to refer the action to the superior judge. There was a recognised formula for this request whereby the procurator requested apostolos 'primo secundo tertio, instanter instantius instantissime' and which appears to have been the formula in other dioceses as well.[2] The judge a quo would normally be obliged to grant apostolos, unless the appeal was irrelevant or patently 'frivolous',[3] but in Ramsay's action Blackstock added that if apostolos were refused he would appeal again to the official principal's protestation and 'tuition'. This would suggest that there was a second category of appeal similar to the 'tuitorial' appeals in Canterbury which, if granted, automatically revoked the sentence of the inferior court together with all subsequent acts done to the prejudice of the party.[4] If tuition had a similar effect in Scottish courts it would seem, at least on the evidence of this appeal, that it was a measure kept in reserve against the refusal of apostolos.

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1. SRO, Dalhousie Muniments, GD45/16/2752. Ramsay appeared regularly in the officials' courts as a defender; he appealed against another decision of the official of Lothian in 1544 (Sent. St. A., fo. 95r), and was pursued for the payment of teinds by Newbattle Abbey in 1546 (Acta I, fos. 5r, 9v, 13r).
2. E.g. at Canterbury (Woodcock, Canterbury, 64).
3. Cf. St A. Form., i, 219, 220n.
4. Woodcock, Canterbury, 66-67.

Two instruments survive from Ramsay's appeal. The second, following fifteen days after the first, is identical except that it substitutes for 'definitive sentence' the words 'interlocutory decree having the force of a definitive sentence', as the decision against which appeal was being made. Whether two separate appeals were involved or whether the first instrument was in error is not clear, but in either case it would suggest that the relative procedures differed little.

Once the apostolos had reached the official principal an inhibition could be despatched to the inferior judge to prevent him from proceeding further in the matter. In the Lothian court the inhibition seems usually to have been delivered to the official by a chaplain, Sir John Wilson, who would presumably have been the official principal's officer in such matters and who could also combine the delivery of the inhibition with the citation of the appellee to attend the hearing of the appeal.[1] The process of inhibition could be a speedy one: in one case the official of Lothian rejected the defence's exceptions on 22 December 1546 and was served with an inhibition pending an appeal on 3 January, the courts having been in vacation from 25 December to 2 January inclusive.[2] Once the inhibition had been served the action was

1. E.g. 'eodem die dominus Johannes Wilsoun inhibuit domino commissario in causa appellationis Alexandri Lauder de Haltoun et suorum collegarum appellantium contra magistrum Jacobum Scott, post ejusdem citationem apud locum sive habitationem infra oppidum Edinburgi coram suis vicinis et servitoribus' (Acta I, fo. 6v).
2. Ibid., fos. 38r, 41r, Wilky v. Wynrem and Symson.

stayed in the inferior court and could go forward to the contest of the appeal, where a number of fates could await it; if it came to sentence, the chances were only slightly better than one in three that it would be upheld. In the event of an appeal against an interlocutory sentence being upheld, the original sentence, and all effects consequent upon it, would be annulled and the further hearing of the action (ulterior cognitio cause) retained in the principal's court for further adjudication.[1] Where it was a definitive sentence that had been disputed, a successful appeal would similarly dispose of the original decision.[2]

In many cases where an appeal was not upheld there was no reason recorded. Some appellants would have been unable to justify their appeals, like Sir John Stevenson who was recorded as having been unable to produce 'dilationes competentes', and who consequently lost his appeal.[3] An appeal could also be dismissed if, like a libel or an exception, it did not contain material that was relevant and capable of reasonable proof.[4] A large number of appeals, however, were recorded as having been 'deserted' (that is, declared invalid) for having exceeded the time limit available for that particular stage of the process - desertion 'propter lapsum fatalis temporis'. Almost all the appeals to Rome for which decrees of desertion were recorded foundered on this particular rock,[5] as

1. E.g. after an appeal had been upheld on 23 June 1543, the principal cause was decided 31 August x 7 November 1543 (Sent. St A., fos. 45r, 54v).
2. E.g. ibid., fo. 40v.
3. Ibid., fo. 61v.
4. 'Non continet causam rationabilem et relevantem que, si probata foret, legitimam reputaretur' (ibid., fo.99v. Cf. also, ibid., fo.95v).
5. See below, 254.

did twenty-nine of the diocesan appeals. This strange phenomenon requires some explanation as it can hardly be supposed that ignorance of the relevant time limits was responsible in every case. As the procedure for the desertion of appeals to Rome was the same as that of the desertion of diocesan appeals the evidence for both will be considered together.

The clerks almost never specified the time limits in question, but one exception occurs where an appeal to Rome was recorded as deserted for not having been made within ten days of the original definitive sentence.[1] Other examples occur, however, where an appeal was made within the ten days following sentence but was still deserted on account of the lapse of the 'fatal term'.[2] There were in fact four such terms in the canonical procedure of appeals. The first allowed ten days from the publication of sentence in which to give notice of the appeal; the second was the period following notice of appeal in which apostolos had to be obtained - a period initially of five days, but extended to thirty by Boniface VIII;[3] the third, which allowed for the appeal to be brought to the attention of the superior judge, had no one definition but would probably be fixed by the judge a quo; and the fourth was the period of one year allowed for prosecuting the appeal.[4] It

1. 'Appellantes intra decendium a sententia nostra contra eos minime appellaverunt' (ibid., fo. 117v).
2. E.g. ibid., fo. 220r, where the appeal had been made two days after the original sentence had been passed on 20 March 1548/9 (ibid., fo. 183v); cf. also ibid., fo. 150v, for the desertion of an appeal that had been made five days after the first sentence on 22 June 1545 (ibid., fo. 115r).
3. Corpus Juris Canonici, ii, col. 107 (Sext., lib. ii, tit. xv, cap.vi).
4. Cf. Reichel, Canon Law, ii, 329-336.

would seem that these rules were also observed at St Andrews, although the records can provide only negative confirmation of it. The period elapsing between the original sentence (where the date of this is given) and the desertion of the appeal on the grounds of non-prosecution (as opposed to not making the appeal in the first place) was never less than fourteen months,[1] which would indicate a period of a year allowed for prosecution.[2]

Such a period was clearly open to abuse as a delaying tactic, since the judge a quo would have been inhibited from proceedings with the action in the meanwhile. This is illustrated clearly by a Formulare document concerning an appeal that had been made from Dunkeld and of which it was reported that 'nothing has been done further in this process by the appellant towards prosecuting his appeal according to law beyond his initial appeal'.[3] The appellant had first been cited to pursue his appeal, and then cited to hear it deserted or to offer reasonable cause against its desertion, but had remained contumaciously absent; the appeal was duly deserted 'de lapsu temporis a jure statuto ad prosquendum' and letters testimonial were issued to that effect. It is indeed unlikely that many of the appeals which were deserted in this way

1. Sent. St A., fo. 71v. The desertion was dated 4 March 1543/4 and related to a first sentence of the same court dated 8x23 January 1542/3 (ibid., fo. 32v).
2. This was certainly as long a period as the crown was prepared to allow for Roman appeals. In 1540 parliament authorised distraint under royal letters in the event of a commission to judges delegate not arriving within a year and a day of appeal (APS, ii, 357).
3. 'Nilque per ipsum appellantem ulterius in eadem processu preter quod semel ipse appellans ad prosequendum prout de jure prefatam suam appellationem' (St A. Form., i, 370). The diocese of origin is given only as 'D' in the document, but the reference to 'G' the bishop would seem to indicate Gavin Douglas, Bishop of Dunkeld 1515-1522 (Watt, Fasti, 99).

had ever been seriously intended for prosecution. For little more than the costs of a notarial instrument and the costs of carriage a litigant could avert a pending adverse sentence, stay the execution of a sentence already passed, or at least secure a year's grace before further proceedings could be taken.

Once an appeal had been made it is not clear who was ultimately responsible for its desertion in the event of the time limits being exceeded. In some cases it would obviously have been in the interests of the appellee to terminate the appeal as swiftly as possible so as to return to the principal action, and to this end an exception of desertion could be lodged on the grounds of time.[1] However, such exceptions were only occasionally recorded and the time elapsing between the date of the original sentence and the date of the desertion of the appeal could vary enormously. An appeal lodged on 15 July 1541 by the Cumming family against a sentence of the commissary of Moray was not deserted 'propter lapsum fatalis temporis' until 6 June 1545;[2] on another occasion the time elapsed was three years.[3] It may have been the official himself who took the initiative on these occasions, for if the original cause had been abandoned or composed there would have been little incentive for the appellee to go to the expense of raising an action of desertion - especially if he was separated from the court of St Andrews by a distance of many miles, and from the original dispute by a period of years.

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1. Sent. St A., fo. 24r.
2. Ibid., fo. 113v.
3. Ibid., fos. 144v-145r.

A good procurator would always keep the possibility of an appeal in mind. At any stage of an action he could protest for 'the remedy of the law' (pro remedio juris);[1] technically this protest served notice of an intention to appeal, but it is clear that such appeals were seldom, if ever brought. The device enabled the procurator to keep his options open and provided a loophole which he might, if the necessity arose, later exploit. Many appeals, however, were seriously proposed and seriously contested. Without an Act Book of the court of the official principal we cannot tell precisely how such appeals were contested, but it seems likely that procedure differed little from that of first instance cases. Certainly the procedure for contesting appeals before the Rota in Rome bears many similarities to the ordinary process used before the official of Lothian,[2] and when in the principal's court a sentence rejecting an exception of desertion directs that the appeal should continue at the point at which it had been interrupted (as for example at ad publicandum producta),[3] there is a familiar ring of Lothian court procedure.

Equally typical of the Lothian court was the time taken for an appeal to be decided. The Sentence Book does not always record the date of the original sentence or of the appeal, and it never records the date at which the appeal reached its first hearing;

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1. E.g. below, Appendix IV, 371.
2. See below, 267-8.
3. Sent. St A., fo. 195r.

nevertheless, the dates that do survive indicate the enormous variation in times taken by appeals to reach a decision. The period elapsing between the date on which an appeal was intimated to the official principal and the date on which it was sentenced could vary from the seven months taken by one appeal from the Lothian court[1] to almost five years, as in the case of one appeal from Orkney.[2] More frequently recorded was the date of the original sentence, whether diffinitive or interlocutory, and in one such case only forty-five days elapsed before a decision was reached in the court of the official principal, although it could take as long as nineteen months.[3] The sixteen occasions when the dates of both sentences are given suggest an average interval between them of about thirteen months.

Of the 140 diocesan appeals that reached sentence in the principal's court between 1541 and 1553 only fifty-eight were upheld.[4] In the cases of those that failed the subsequent procedure depended on the stage which the original action at first instance had reached when the appeal was lodged. In the case of a definitive sentence it would be recorded that the appellant had unjustly appealed from the sentence of the judge a quo, that the sentence was accordingly confirmed and ratified, and that the action was remitted to the judge a quo for the execution of the

1. Appeal dated 28 July 1542, sentence dated 7 March 1542/3 (ibid., fo. 37r).
2. Appeal dated 5 May 1543, sentence dated 7 March 1547/8 (ibid., fo. 158v).
3. Appeal from Dunkeld monitorials dated 23 February 1551/2, sentence dated 9 April 1552 (ibid., fo. 257r); appeal from Brechin sentence dated 25 June 1550, appeal sentence dated 14 January 1551/2 (ibid., fo. 252r).
4. See below, Appendix III, 350-1.

original sentence.[1] In the case of appeals a gravamine, from an interlocutory, a similar procedure was followed: it was recorded that the appellant had appealed unjustly and that the judge a quo had done him no injury (minime gravasse) by his sentence or decree, which was accordingly upheld.[2] The further hearing of the action could then be retained by the official principal, although this happened only rarely[3] and was in fact expressly forbidden by the statutes of 1549;[4] more usually the action would be remitted to the judge a quo, and an act of remission would be given to the appellee to present to the inferior judge. Thus following the dismissal of an appeal by the official principal on 20 December 1546[5] the appellee appeared before the official of Lothian on 3 January 1546 and, producing his act of remission, requested that the parties should be cited to hear the principal action resumed according to the purpose of the last diet assigned by the judge.[6] In both types of appeal the costs were borne by the appellant if the appeal failed and by the appellee if it was upheld.

Although appeals to the official principal of St Andrews were confined almost exclusively to those originating in the courts of the suffragans of St Andrews, the Sentence Book does record a

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1. E.g. Sent. St A., fo. 103v.
2. E.g. ibid., fos. 11v-12r.
3. E.g. ibid., fo. 174v.
4. SES, ii, 126.
5. Sent. St A., fo. 151v.
6. Acta I, fo. 41r. Cf. also the act of remission produced in the Lothian court on 30 June 1548 (ibid., fo. 423r) following a sentence of the official principal on 14 June 1548 (Sent. St A., fo. 164v).

few exceptions to this rule. An appeal from a sentence of William Gibson, Bishop of Libaria and suffragan of the see of St Andrews itself under Cardinal Betoun, was apparently made to the official principal, who ruled that it should not be received in his court;[1] this would seem to have been the only possible answer that the official could have given, since the ordinary jurisdiction delegated to Gibson by the cardinal could have been no less than that delegated to the official principal. There were also two actions originating in the diocese of Glasgow; in the first case an action had clearly been brought to resist the hearing of the appeal by the official principal of St Andrews, but this was dismissed and the appeal proper was ruled to be justly devolved before the official principal, who directed that its hearing should commence at ad libellandum.[2] Three months later the appeal was declared to have been upheld, on account of the Vicar-General of Glasgow having failed to do justice.[3] The second Glasgow appeal involved a straight desertion on time limits, and was recorded like any other diocesan appeal.[4] It is difficult to see why these two cases alone should have been received from Glasgow; at other times any attempt by a St Andrews judge to decide a matter concerning subjects of the Archbishop of Glasgow was sternly resisted.[5] The vacancy of the archdiocese of Glasgow at the time of the first appeal (September-December 1548) may have been significant, but no such consideration

1. Sent. St A., fo. 127r.
2. Ibid., fo. 172v.
3. Ibid., fo. 178r.
4. Ibid., fo. 251r.
5. Cf. St A. Form., i, 359-60.

seems relevant at the time of the second appeal (December 1551). One other exceptional case was an appeal received and upheld from the court of the commissary of the jurisdiction of Currie.[1] This was the only such appeal recorded in the Sentence Book and although it suggests that the jurisdiction of the archdeacon (whose prebend Currie was) was subject to the review of the official principal, it cannot be used as the basis of any firm conclusions.[2]

2. APPEALS TO ROME

The subject of appeals made from the court of the official principal to Rome remains a tantalising one. Just as the fact of an appeal made from a decision of the official of Lothian left no mark in Acta I, so we should expect no indication in the records of the principal's court of the appeals that were successfully appealed from there to Rome. Those appeals to Rome which are recorded in the Sentence Book never left St Andrews, since the sentences were sentences of desertion. Almost all of these appeals were deserted propter lapsum fatalis temporis (on occasion the phrase is not included, but it seems unlikely that any other cause was involved), although the appeal of the Prioress of Eccles against the Prior of Pittenweem was renounced because she had recommenced litigation in

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1. Sent. St A., fo. 57v. Currie was the peculiar jurisdiction of the Archdeacon of St Andrews (cf. above, 74n).
2. It will be remembered that the jurisdiction of the commissaries of the Archdeacons of Glasgow was subject to appeal to the court of the Bishop or Archbishop according to the terms of the settlement of 1428 (cf. above 61-62).

an inferior court on the matter contained in the appeal.[1] The question clearly arises of how many appeals were in fact successfully appealed to Rome from the court of the official principal.

If we look at the statistics of the diocesan appeals we find that of the 144 sentenced by the official principal twenty-nine were deserted on time limits. Allowing for the fact that this ratio would be diminished by the greater obstacles in the way of forwarding an appeal to the papal curia, we would nevertheless expect that a substantial number of appeals would in fact have reached Rome, in proportion to the forty that failed. Of this substantial number there is no trace. An examination of the records of the Roman Rota for the 1540s and 1550s has revealed not one action that can positively be identified with a suit that was heard at first instance before one of the St Andrews officials.[2] This is not to say positively that no appeal was made to Rome during the 1540s from a decision of a St Andrews official. An appeal made from an intermediate stage of an action in the court of the official principal would not leave any record in the Sentence Book (that is to say, no record of a sentence) and such a case would not readily be identifiable in the Rota records since the Roman clerks seldom differentiated between judicial and extra-judicial appeals (that is, between appeals made from an earlier judicial decision and appeals made direct to

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1. Sent. St A., fo. 71r.
2. But cf. below, 258.

Rome without a prior hearing at first instance). It should also be remembered that there was more than one court in Rome capable of handling appeals. The Sacra Romana Rota, with its complement of twelve judges, or auditors, was the chief court of the church in the matter of ecclesiastical civil actions,[1] but matters of conscience, which could include questions relating to matrimony, absolution from ecclesiastical censures or the release from the observance of an oath, could go instead to the Apostolic Penitentiary[2] whose records remain closed to this day.

Nevertheless, the absence of any significant quantity of appeals passing to Rome from the St Andrews officials (whose courts were probably the busiest in the country) is striking; the question we should next consider is whether or not it is in fact surprising. The particular concern of much of the business conducted before the Rota was with ecclesiastical incomes and benefices, and this included much that originated either in the diocese of St Andrews or in the other dioceses of Scotland. The number of benefice actions that were heard by the St Andrews officials, however, was negligible: there were none at all in the Lothian court between 1539 and 1551, and only eleven between 1541 and 1553 in the court at St Andrews.[3] Furthermore, such actions as there were related only to very minor benefices, to chaplaincies and to the cure of altars, and there was only one that related to the possession of a parsonage.[4] Similarly,

1. Cf. N. Hilling, Procedure at the Roman Curia (New York, 1907), 132-4.
2. Cf. ibid., 127-8.
3. See above, 169-71.
4. See above, 170.

if we look at the actions which related to ecclesiastical incomes, of which there was a much greater number,[1] we find that the vast majority related not to the right to such incomes but rather to the difficulty in exacting their payment in one or more specified years, and many of these actions were brought by lay tacksmen. It would seem that neither the court of the official of Lothian nor the court of the official prinicpal was a forum for the disputed privileges or benefices of the clergy, and that such clerics as did take their disputes to the officials' courts for settlement would probably have been prevented by economic considerations, at least, from disputing such settlements before the Roman auditors.

It seems likely that similar social and economic distinctions applied to lay litigants in the ecclesiastical jurisdictions; for them also the officials were not the only ecclesiastical judges available to settle disputes. There is no doubt, as we have already suggested,[2] that a considerable amount of judicial business was conducted by judges delegate who were appointed, on application to Rome, by a papal commission. Equally, the St Andrews Formulare bears witness to the great number of ad hoc commissions by which the archbishops disposed of grievances that were brought directly to their attention.[3] This latter means of settling a dispute in particular may have been particularly attractive to those who were

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1. See above, 156-69.
2. See above, 79-81.
3. See above, 54-56. Cf. also, St A. Form., ii, 197-8, where an appeal to the metropolitan see was delegated to Abraham Crichton and John S.

not prepared to submit themselves to the regular procedure of the officials' courts and yet who baulked at the expense and delay of appealing to Rome. We cannot come to any firm conclusions on who did, or did not, take their disputes to the officials' courts until the question has been discussed in greater detail,[1] but it is hard at this stage to avoid the impression that it was not the great of the land with their pressing problems who appeared before the officials, but rather the more ordinary members of the community whose affairs were not so important, or their resources so great, that they could submit their grievances either to the archbishop or to the pope in Rome. There is one interesting entry in the Rota records which appears to lend weight to this proposition. In 1551 the official of Lothian gave a sentence in favour of the tacksmen of the teinds of Stow against one Gavin Borthwick and fifty-one fellow parishioners of the parish of Stow; Borthwick and his friends appealed but their case was dismissed by the official principal.[2] Almost a year later the tacksmen were again challenged on the subject of the teinds of the parish, but this time it was by Lord Borthwick before the Rota in Rome.[3]

There remains to consider the evidence of the forty deserted appeals to Rome. It was earlier suggested that few of the diocesan appeals that were deserted on considerations of time may

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1. See below, 300-1.
2. Sent. St A., fo. 242r.
3. Vatican Archives, S.R. Rota, Manualia, 263, fos. 320v, 324v, 382v, 383r, 387v, 441v, and others. The case was regularly postponed and finally disappeared undecided.

have seriously been intended for prosecution; this seems more overwhelmingly the case with regard to the appeals to Rome. It cannot reasonably be suggested that in every case of desertion the procurators concerned, men wise and skilled in every legal technicality, could have failed to take account of the canonical regulations on time. It must therefore be concluded that giving notice of an appeal to Rome was a delaying tactic by which a year's grace could be obtained by the party against whom sentence had been given; it may have been such practices, as much as appeals to Rome actively pursued, that were behind the demand of the lords in 1559 that 'appelation unto Rome suld not suspend the execution of sentences gevin heir within this realme'.[1]

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1. SES, ii, 149-50.

CHURCH LAW AND THE SECULAR COURTS

CHURCH LAW AND THE SECULAR COURTS

1. ECCLESIASTICAL LAW

It is hoped that this survey of the Scottish ecclesiastical courts will open the way to much further research on all aspects of the subject, but nowhere is such research more needed, or more outwith the scope of this thesis, than on the question of the law which was administered by the officials in their courts. Two fields in particular need to be studied: the precise relationship of the law found in the officials' courts to the canon law as a whole and to the law found in the ecclesiastical courts of other countries; and secondly, the relationship of the law practised in the church courts to Scots law, both as it was understood at the time and as it developed later. These questions are, in any detail, beyond the scope of this thesis not only because they would require considerable experience and training both in the canon law and in modern Scots law, but also because quite simply the extant records of the church courts say almost nothing about substantive law. Nevertheless, both subjects are of more than passing interest to any general discussion of the church courts and, as such, deserve at least some general observations.

(i) The Substantive Law of the Church Courts

In principle at least, the importance of the canon law to the law of the church courts now appears to be beyond question. The subject was exhaustively argued in relation to the English courts following on the comments of Canon Stubbs in the parliamentary report of 1883.[1] Stubbs declared that 'the canon law of Rome, although always regarded as of great authority in England, was not held to be binding on the courts'.[2] This opinion was challenged by Maitland who argued that in no case were the English church courts able to pick and choose the parts of the canon law that they would or would not accept. William Lyndwood's collection of provincial constitutions of the Archbishops of Canterbury were not, in Maitland's view, the basis of an English canon law but merely bye-laws which complemented the universal law of the church.[3] He pointed out also that references to a 'jus commune' did not indicate a common law of custom as opposed to a statute law: 'by jus commune the canonist meant the law that is common to the universal church, as opposed to the constitutions or special custom or privileges of any provincial church'.[4]

When we turn to consider the question of the Scottish courts the position becomes even more clear.[5] Compared to the great quantity

1. See above, 192-3.
2. Parliamentary Papers (1883), xxiv, p.xviii; cf. also ibid., 24-25.
3. F.W. Maitland, Roman Canon Law in the Church of England (London, 1898), 35.
4. Ibid., 4.
5. Cf. R.K. Hannay, 'Some Questions regarding Scotland and the Canon Law', Juridical Review, xlix (1937), 25-34.

of material collected by Lyndwood, the Scottish statutes are meagre indeed. Patrick reminds us that, until the stimulus of the English Reformation prompted the church into action, there were only a little over one hundred statutes known to have been decreed by Scottish councils, and even when the period of 1549-1559 saw a renewed surge of legislative action on the part of the councils more than a dozen statutes were taken directly from the canons of the council of Trent.[1]

> 'English canonists followed closely the jus commune, and seem always to have treated papal decretals as a supreme authority ... the Scottish canonists evidently relied even more closely on the decretals and the jus canonicum.'[2]

Certainly there was little enough in the native statutes to provide a credible alternative. It is no doubt a measure of the unquestioning application of the law of the universal church that so little reference was made in the records of the officials' courts to the actual law that was being administered there. The officials themselves were, as we have seen,[3] men highly trained in the academic study of the canon law, and as late as the early sixteenth century canon lawyers who had trained in the schools of Paris were exercising jurisdiction in the ecclesiastical courts of Scotland.[4] Both through such men

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1. Patrick, Statutes, li-lii.
2. Ibid., lii.
3. See above, 101-2.
4. E.g. William Wawane, official of Lothian 1492-1515, and Andrew Sibbald, official of Glasgow 1516-19 (Auctarium Chartularii Universitatis Parisiensis, ed. C. Samaran and A. van Moé [Paris, 1935], iii, cols. 169 and 227, 629).

and through the constant exchange of letters and documents, as appeals and supplications travelled to Rome and judges delegate were appointed in return, were Scottish lawyers kept in close contact with the canon law of continental Europe. It is not surprising that when, in an isolated reference to substantive law in the official's court,[1] the rector of Restalrig protested against lay occupancy of his church's land, it was by virtue of the jus commune of the universal church.[2]

(ii) The Canon Law and Scots Law

The second question is even less easy to answer precisely. That the development of Scots law was influenced by the work of the canon lawyers seems undeniable: as late as the eighteenth century Lord Hailes could declare that 'the Canon Law is not the Law of Scotland; but the Law of Scotland contains much of the Canon Law. This is so certain, that in many cases we determine according to the Canon Law without knowing it'.[3] The same process of exchange which kept the ecclesiastical lawyers in Scotland in touch with the mainstream of European canonical studies had an important effect also of making the canon law available to Scottish jurists. Lord Cooper highlighted the areas in Regiam Majestatem which depend for their inspiration on the canon law,[4] and especially the sections at the end of book one and the beginning of book two which have now been

1. References do occur to the 'style' or 'statutes' of the court but these are concerned with procedural law, in which each court undoubtedly had its own variations in practice (see above, 204n, 221n).
2. 'Non licet de jure commune disponere assedare ad vitam et presertim in prejudicium ecclesie' (Acta I, fo.28r, Logan v. Acheson et al.).
3. D.B. Smith, 'Canon Law', Sources of Scots Law, 192.
4. Regiam Majestatem, 27-32.

identified as originating in the Summa in Titulos Decretalium of Goffredus in Trano, dating from the 1240s.[1]

> 'This identification confirms that before 1400 the main influence of Roman law on Scots Law was exerted through the medium of the canon law rather than directly. This influence appears to have been strongest in matters of legal procedure, although the distinction between substantive law and procedure must not be pressed too far at this period.'[2]

We should not, therefore, be surprised to find close links between the courts of the church and the courts of the state. Not only was there an early and substantial canonical influence on the development of Scots law, but in the sixteenth century the new college of justice consisted initially of as many churchmen as laymen, while both judges and lawyers of the church courts, as we have seen, were equally at home in the court of session. The fruits of this exchange are not hard to find. Although it would not be correct at any time to assume that what was the practice in one sixteenth-century court was necessarily the practice in another, there is no doubt that familiarity with the rules of an official's court procedure in the 1540s is as good an introduction as any to sixteenth-century legal procedure in general. The question of substantive law must be left for another day. The canonical features of Regiam Majestatem are only one aspect of a complex relationship which will

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1. P. Stein, 'The Source of the Romano-Canonical part of the Regiam Majestatem', SHR, xlviii (1969), 109-11.
2. Ibid., 112.

be unravelled only with much skill and much research; but if a historian is not qualified to assess the canonical content of the substantive law of Scotland, he may, nevertheless, still point to some areas of procedural law where ecclesiastical influence may have been strong.

It will by now have become apparent that many subjects treated by Balfour in his Practicks relate closely to the forms of procedure known to have been followed in the court of the official of Lothian. Although an ecclesiastical bias might be expected from a former official of Lothian, Balfour's collection was not made until the late 1570s, after the abolition of the old church courts and after he had held the successive offices of clerk register and lord president, and it was a collection of the practices of the court of session and of other lay tribunals, not of the ecclesiastical jurisdiction. The close ties of the official's court and the court of session may help to explain this community of practice, but the session was not the only law court to use apparently ecclesiastical procedures. Procedure in the court of Admiralty in the 1550s has been described as presenting 'a curious mixture of the Small Debt Court and the court of session',[1] but many of its features (such as the use of the libel, the three probatory diets, private examination of witnesses, or dilatory or peremptory exceptions) could have been inspired more directly by the usage of the Lothian court; and this

1. Acta Admirallatus, xxi.

source seems all the more likely when we remember that Lothian court procurators made regular appearances in the Admiralty court.[1] In the case of the sheriff court the similarities of procedure are even more striking. The procedure of the sheriff court of Fife was described by Croft Dickinson in an appendix to his edition of the court records of the years 1515 to 1522, and his account of the process in civil actions could, with a few alterations, be taken for a summary of official's court practice.[2] This similarity was not confined to technical expressions but embraced such essential features as the detailed presentation of the pursuer's libel, the stages of litiscontestation and probation, and the roles accorded to exceptions. There is, in short, ample evidence of a substantial body of procedural law which was held in common among the principal courts of both church and state; a more important question, perhaps, is where did this 'common' law originate?

There seems little doubt that the formative influence came from the ecclesiastical lawyers, for the type of procedure found in the Lothian court has many parallels, not only in other courts of the time, but in other countries and in earlier centuries. Woodcock's description of procedure in instance suits at Canterbury during the late fifteenth and early sixteenth centuries, for example, shows the community of practice which united the courts of the primatial sees

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1. See above, 122-3.
2. Fife Court Book, 310-22.

of England and Scotland.[1] Nor was it purely a late mediaeval development: a litigant before papal judges delegate in early thirteenth-century England would have witnessed the same progress from libel to exception, litiscontestation, proof and sentence as a litigant before the official of Lothian.[2] Ecclesiastical procedure acquired both definition and uniformity at an early stage,[3] and it was a uniformity shared by the developments at the very heart of the church's legal machine - at Rome. If we turn again to consider the Rota, we can find in its procedure one illustration of the hub of that wheel whose spokes eventually reached into the court of the sheriff of Fife.

> 'From its very beginning the Rota adopted the form of the Roman Canon Law procedure, and retained the same, except for the adoption of some simplified methods, during the entire period of its existence. The characteristic marks of this procedure are, (1) the rigid sequence of terms with numerous process stations (Termini substantiales: ad dicendum contra commissionem, ad libellandum [litiscontestatio], ad articulandum [the drawing of bills of complaint], ad dicendum contra articulos, ad producendum omnia, ad dicendum contra producta, ad declarandum et jurandum de calumnia); (2) the method of articulation, i.e., of reducing the points of dispute into definite articuli or propositiones; (3) the division of the process by means of the conclusio after the term ad producendum omnia into separate proceedings for proof and judgement.'[4]

This, with due allowance for different court 'styles' and for the different type of action involved, is the essence of the official's court procedure. It is not surprising that we can then turn to the

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1. Woodcock, Canterbury, 50-59.
2. Sayers, Judges Delegate, 78-95.
3. Ibid., 99.
4. Hilling, Procedure, 135.

formularies in use with the Rota advocates at the beginning of the sixteenth century and find there, in great detail, precisely the same types of procedural steps which had already enjoyed a long currency in the ecclesiastical courts of England and Scotland.[1]

We should beware of oversimplifying the problem; ecclesiastical law itself drew much of its inspiration from the old law of Rome and 'Roman law provided the juristic mechanics and the technical equipment for all canon law'.[2] Canon law was not the only means by which Roman law was spread across Europe, while frequently the two are so intertwined as to defy any precise attributions.[3] Nevertheless, the existence of a supra-national judicial system that was not only widespread but also developed to a high degree of definition and uniformity, and which maintained a constant interchange of papers and personnel with every corner of Christendom, must have been a vital factor in the relative uniformity of procedure in sixteenth-century Scottish courts.

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1. E.g. Termini Causarum in Romane Curie servari soliti in Causa Beneficiali (Mainz, 1490) [Glasgow University Library, MU 16 - f. 29], fos. 2r, 5v-8r, where a similar progression of diets, including ad libellandum, ad articulandum and ad probandum omnia, is illustrated. A much larger volume, the Formulare Advocatum et Procuratorum Romane Curie (c. 1500) [G.U.L., MU 14-f.20] goes into each stage in exhaustive detail; I have not been able to do more than glance through this work but the section on exceptions (fos. 183r-198v), for example, would appear to be equally applicable in the officials' courts.
2. W. Ullmann, Law and Politics in the Middle Ages (London, 1975),119.
3. Cf. Regiam Majestatem, 27-32.

2. THE RELATIONSHIP BETWEEN JURISDICTIONS

A broad degree of procedural uniformity undoubtedly made for convenience but it was no guarantee of harmonious relations between the different jurisdictions. With the church courts attracting and deciding so great a volume of legal business there must inevitably have been times when their interests clashed with those of the state judicatures. The most obvious potential point of friction was Edinburgh, where the court of session was established in 1532 'for the doing and administration of justice in all civil actions',[1] but burgh courts and sheriff courts had long been established throughout the kingdom and each had their own claims to civil jurisdiction.[2] The relationship of these courts to the courts of the officials must now be considered.

(i) The Central Courts

The establishment of the court of session was an important step towards the regulation and the permanent organisation of the central courts of the state, but it should not be forgotten that similar judicial duties had long been performed by other bodies, in particular by the auditors of the general council and by the lords of council.[3] The relationship of these earlier tribunals with the ecclesiastical jurisdiction seems to have been generally good, based

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1. Acta Sessionis (Stair), xiii.
2. There were already over seventy burghs by 1400 (G.S. Pryde, 'The Burgh Courts and Allied Jurisdictions', Scottish Legal History, 384; by the same period more than thirty sheriffdoms had been established (Fife Court Book, 347-364).
3. Cf. A.A.M. Duncan, 'The Central Courts before 1532', Scottish Legal History, 321-40.

on a mutual respect for the rights and prerogatives of each other. It was the opinion of Lord Clyde that there existed 'a large measure of inter-communication and indeed of co-operation between the jurisdictions',[1] and in his edition of the Acta of the lords of council for the years 1501-1503 he found 'no signs ... of friction in this dual system of judication'.[2] The lords of council seem to have been ready to remit actions to the official of Lothian if it happened that the defender in an action was a cleric,[3] or if a case brought before them properly belonged to the ecclesiastical jurisdiction, such as the action which was 'renounced and referred by the lords of council to be determined and decided before the spiritual judge ordinary because it is a spiritual action and testamentary'.[4] The state was also ready to lend its assistance to the enforcement of ecclesiastical censures when an official invoked the 'secular arm'.[5]

The effect of the reorganisation of 1532 on this comfortable situation is difficult to guage, but the editor of the court of session's Acta in the first year of its existence chooses a rather different emphasis from that of Lord Clyde: 'while there is no sign of interference with church jurisdiction in its recognised fields of

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1. Acta Concilii (Stair), xxxv.
2. Ibid., xxxvi.
3. E.g. ibid., 138.
4. ADC, cxxix.
5. As in 1488 when the official principal requested the assistance of the civil power against Andrew Oliphant who had remained contumaciously excommunicate for more than forty days (W. Fraser, Memorials of the Family of Wemyss of Wemyss [Edinburgh, 1888], ii, 111).

marriage, legitimacy, testament and moveable succession, the records clearly show the dependence of the clerics on the civil power and the determination of the lords to maintain the power'. The affairs of clerics, he goes on to suggest, were subject to lay supervision, disabusing 'any conception of a private and self-sufficient clerical government prejudicial to the rights of laymen'; any excess of jurisdiction by the church courts was 'swiftly corrected'.[1] It will perhaps not be possible to come to any final conclusions on the matter of the relative jurisdictions until more of the pre-Reformation records of the court of session have been examined in detail, but some consideration should be given to a point of view which suggests a questionable approach to the whole problem.

The records appear to show not so much an encroachment by the court of session, or a restriction of the jurisdiction formerly enjoyed by the officials, but rather a greater concern for defining boundaries. In one case where the official was 'peremptorily ordered to desist'[2] the action revolved around a decreet arbitral which had been registered in the books of council. An appeal raised against the decreet before the official of Lothian was very properly stopped, since the registration of the decreet had given it the value of an act of council[3] and it was to that court that any action clearly belonged.[4] On another occasion the official was

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1. Acta Sessionis (Stair), xvii-xviii.
2. Ibid., xvii.
3. For registration in the books of a court, cf. above, 179-80.
4. Acta Sessionis (Stair), 35-36.

required to desist from proceeding in a matter which pertained to the Exchequer.[1] It may well have been that in the years prior to 1532 the officials had not been too particular about the cases that were brought before them, even if they were not properly within the scope of their jurisdiction. The greater degree of organisation following the establishment of the court of session would have led to a tightening up by the civil power in such cases, but there is no reason to believe that this would have included actions which an official would have regarded as properly within his own competence.

To a certain extent this remains a question of interpretation, but we can be clear on one point - that it is extremely inadvisable to approach this area of jurisdictional relationships in search of evidence for conflict or, indeed, for the subordination of one to another. The question of a 'self-sufficient clerical government prejudicial to the rights of laymen' simply does not arise; we have already seen that in the Lothian court at least the rights and the interests of laymen were unquestionably of decisive importance, while actions for teinds or other church incomes (which might be deemed prejudicial to laymen) were comparatively few. Furthermore, the great division which any discussion of the 'two jurisdictions' presupposes to exist would have seemed a strange notion to a sixteenth-century jurist. The president of the court of session and half the

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1. Ibid., 5.

lords were, from the beginning, drawn from the ranks of the senior clergy.[1] Abraham Crichton sat regularly in the court of session, as did his predecessor as official of Lothian,[2] and the very ease with which actions could pass from one court to the other indicates the degree of congruence that the two jurisdictions had achieved.

In the matter of enforcing their penalties, however, there is no doubt that the church courts were often dependent on the civil power. When excommunication and interdict had failed to have any effect against the laymen who had abducted the Dean of Merse, for example, Archbishop Forman had no alternative except to invoke the secular arm against the miscreants.[3] It may be noted, however, that the rendering of assistance could also be a mutual process. When the Prior of Coldingham refused to honour an obligation made in the presence of Governor Albany 'unless he should be compelled by canonical process' (per cohercionem canonicam), it was the king who had to request the archbishop to take the appropriate action.[4] Just as the privy council was prepared to take the same action in cases of attacks on ecclesiastical officers as they would in cases of attacks on royal officers,[5] so we find that the church

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1. Ibid., xiv.
2. See above, 103. An example of the lack of distinction between the jurisdictions is found in 1528 when Thomas Coutts, then official of Lothian, was one of the lords of council who decided an action for the recovery of teinds brought by the Abbot of Cambuskenneth, the future lord president of the court of session (Cambuskenneth Registrum, 218).
3. St A. Form., i, 84-89. Cf. below, 312-13.
4. St A. Form., i, 126.
5. RPC, i, 65.

was equally prompt in punishing priests who interfered with the king's officers in the execution of their duty.[1]

(ii) The Sheriff Courts

The official of Lothian had to contend with the claims of the court of session, but no other church court had so powerful a rival permanently close at hand. The competence and effectiveness of the sheriff courts must have varied widely, and although Cosmo Innes's statement that in them were 'no lawyers'[2] may have been exaggerated, there is some evidence that the sheriff courts would not always have the legal knowledge to deal with the more complex cases that came before them. In 1551 the court of session appointed a commission, which included the Archbishop of St Andrews and his two officials, to hear a case which had proved too much for the Sheriff of Perth and which required men 'skilled in the knowledge and practice of law'.[3] The sheriff courts may also have been beset by the twin evils of local jurisdiction - corruption and partiality. It will be remembered that the Moral of Henryson's satire was turned against the 'sheriff stout',[4] and although complaints of the lack of justice at this level seem to have declined somewhat by the early sixteenth century, there were still 'unmistakable signs of both weakness and venality in the localities'.[5] At the best of

1. E.g. St A. Form., ii, 146-7.
2. Innes, Antiquities, 239.
3. SRO, RH6/1516.
4. See below, Appendix I, 337.
5. Fife Court Book, ciii.

times the sessions of the sheriff courts were irregular, convening perhaps only twenty or thirty times in the course of the year.[1]

Given this uncertain background it might be expected that the church courts would have extended the scope of their activities at the expense of the sheriff courts. There certainly seems to have been some jealousy of the encroachment by other jurisdictions on the part of the sheriffs. In 1542 the Sheriff of Linlithgow ordered that nobody subject to his jurisdiction should take an action before any other judge spiritual or temporal, but he was obliged to make an exception of those actions which properly concerned the spiritual judge.[2] The church was equally zealous in protecting its own judicial rights. When the Archbishop of St Andrews heard that royal letters had been procured directing the Sheriff of Kincardine to proceed in a matter which was already the subject of an action before the official principal, he promptly inhibited the sheriff from going any further, under pain of excommunication.[3] Indeed the claim that an action more properly belonged to another court was a frequent tactic of defence in the sheriff courts;[4] if the letters of an official could be produced to support the claim the sheriff would be inhibited from proceeding further.[5]

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1. E.g. Cupar sheriff court met seventeen times between October 1520 and October 1521 (ibid., 184-226); Linlithgow sheriff court met twenty-eight times between October 1546 and October 1547 (SRO, Linlithgow Sheriff Court Act Book, SC41/1/1, fos. 100-26).
2. Fife Court Book, xxvi n.
3. St A. Form., ii, 147-8.
4. E.g. Fife Court Book, 16, 18.
5. E.g. ibid., 243.

Nonetheless, the relationship between sheriff and official could also be one of co-operation. An action in progress in a sheriff court might raise an incidental issue that the sheriff himself was not competent to decide upon, such as an exception of bastardy raised before the Sheriff of Perth in February 1548/9, which was transferred to the court of the official principal and there rejected on the grounds that it was inept.[1]

(iii) The Burgh Courts

Jealousy of the ecclesiastical jurisdiction was not confined to the sheriffs. In 1524 the provost, bailies and council of Edinburgh declared that 'na maner of nychtbour nor induellar within this burgh call nor summoun ane uther befoir the officiall in the consistorie for na actioun nor mater that may be decydit befoir the provest and bailies, and specialie for na materis that concernis the commoun guid of the toun, bot all sic materis be callit befoir the provest and bailies, and that na actioun pas to the consistorie bot thai causis that concernis the privelege thairof'.[2] It is unlikely that the Edinburgh bailies had any serious hopes of diverting the flow of litigation from the court of the official of Lothian, but their protest shows that they were anxious to protect the privileges of their own jurisdiction - a jurisdiction which, to a greater or lesser extent, was enjoyed by burghs all over Scotland.

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1. Sent. St A., fo. 181r.
2. Edinburgh Burgh Recs., i, 219-20. Croft Dickinson noted of the Sheriff of Linlithgow's warning (see above) that 'similar inhibitions can be found in many burgh court books' (Fife Court Book, xxvi n.).

The basis of burgh jurisdiction was the community which it served. The bailies enforced the laws and customs which had largely been framed by the burgesses of the community themselves at one of the three annual head courts.[1] These laws concerned good neighbourhood, 'vicinitas', and because of that 'the court possessed a jurisdiction necessary to ensure that vicinitas was maintained - a jurisdiction in civil causes between burgess and burgess'.[2] The burgh court possessed also a criminal jurisdiction which, although limited, could be extended by special grant,[3] and was also a court of record. It could thus perform a useful function within the community, especially in providing the machinery for registration or acting when there was no other court immediately available. While there were only three annual head courts at which all the burgesses would assemble, ordinary sessions of the burgh courts were regular affairs. For example, between the Michaelmas head court of 8 October 1555 and the Yule head court of 22 January 1555/6 the Haddington burgh court met a total of fifteen times, usually presided over by the provost and one or two bailies.[4] Notwithstanding the aggressive tone of the Edinburgh bailies in 1524, there is little evidence of conflict between such courts and the courts of the church. In one incident at St Andrews when the town bailies interfered with the annual rent of a chaplaincy and summoned the chaplain and his tenants to their court, they were swiftly

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1. Cf. Early Records of the Burgh of Aberdeen, 1317, 1398-1407, ed. W.C. Dickinson (SHS, 1957), lxxxii.
2. Ibid., lxxix.
3. Ibid., cxl-cxli.
4. SRO, Haddington Burgh Court Book 1555-1560, B30/10/1, fos.14r-37r.

rebuked and ordered to desist on pain of cursing.[1] However, it would seem that matters relating to the income and endowments of chaplaincies occurred regularly in the Haddington burgh court without contention,[2] while burgesses appeared regularly in the officials' courts in pursuit of matters no more spiritual than the payment of debts.[3] In general it would seem that the courts were not usually too particular about precise boundaries on either side, and the occasional bout of sabre-rattling can have achieved few concrete results in an area where the legitimate interests of different jurisdictions must often have overlapped.

(iv) Other Jurisdictions

Considering the extent of the officials' jurisdiction it is surprising how few references there are to other courts in the records. In areas where several jurisdictions were active the best will in the world could not have avoided some competition, nor inconvenience for the people in between. This was stressed in 1540 by the tenants of the lordship of Coupar, who complained that they were troubled by diverse jurisdictions and were regularly summoned before 'the Sheriffis of Perth, Forfar, commissaris of Sanct Androus, Dunkeld, and othir jugis, for civile and prophane actiouns, quhilk mycht be eselie decidit in thair auin bailzie court', and at much less expense.[4] However, what little evidence there is suggests once

1. St A. Form., i, 126-7.
2. E.g. SRO, B30/10/1, fos. 17v, 18r.
3. E.g. Sent. Laud., fo. 300v. Some thirty Edinburgh burgesses obtained sentences in the Lothian court 1539-1551.
4. Rental Book of the Cistercian Abbey of Cupar Angus (Grampian Club, 1880), ii, 298-9.

again that co-operation between the jurisdictions and an easy interchange of business were the norm. There was no doubt much community of practice between the courts, and a decision of one could be made the basis of an action in another;[1] even the young Abraham Crichton is found as a procurator in the regality court of Dunfermline.[2]

We should, of course, beware of making too much of the distinction between 'church court' and 'lay court'. The Archbishop of St Andrews, for example, had all the responsibilities of a great landowner and the prerogatives of his regality courts were as important as those of the officials' courts; we find Archbishop Forman constituting four men as his 'bailies, commissaries, procurators and emissaries, both general and special' to repledge tenants of the regalities of St Andrews and Dunfermline from the justice ayre.[3] As a landowner the archbishop obviously had many interests in common with other landowners, but a similar community of interest was present to a greater of lesser extent at all levels of jurisdiction. The church courts were not eccentric anomalies but an important and integral part of the permanent judicial structure in Scotland, and would have been generally recognised as such. While

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1. E.g. a sentence of the bailie of the regality of Kerse was used as the basis of a further action before the official of Lothian in 1546 (Acta I, fo. 9r, Callendar v. Hart).
2. Regality of Dunfermline Court Book 1531-1538, ed. J.M. Webster and A.A.M. Duncan (Dunfermline, 1953), 69.
3. St A. Form., i, 125-6. Cf. also Dunfermline Court Book, 4-6.

every court would be anxious to preserve its privileges, and the financial advantages arising out of them, it was in the interests of none of them that they should fight amongst themselves.

CHURCH COURTS AND SOCIETY

CHURCH COURTS AND SOCIETY

The study of the church courts as a part of the legal and ecclesiastical establishments has only just begun, but we should beware at this stage of thinking too much of the institution itself and not enough of what lay at its heart - the ordinary people of Scotland and their affairs. The church courts may have been recognised by lawyers as an integral part of the national judicial system, but was this recognition extended also by the people? The question of popular opinion is always a difficult one, but it is clear both from the records and from contemporary literature that there was some considerable opposition to the courts and their processes, an opposition that was reflected in more serious criticism of the ecclesiastical jurisdiction, both from within the church and from without. It may help to approach the question with three particular areas in mind: firstly, the popular reaction and resistance to the processes of the church courts; secondly, the technical shortcomings of the courts and the criticism of their procedure; and thirdly, the question of ecclesiastical censures and the immoderate use of cursing. Finally, we should try and set the courts in their historical perspective, and consider some of the political events of the years covered by the records to see what effect, if any, they may have had upon the operations of the officials.

1. POPULAR HOSTILITY

On 16 May 1547 a macer (bajulus) of the Lothian court named William Langlands left Edinburgh bearing letters of citation against Lord Borthwick and letters of excommunication against a number of his tenants; the letters were to be executed by the chaplain of Borthwick as part of a long drawn out contest between the peer and his kinsman George Hay of Menzion.[1] Arriving at Borthwick Castle (some eleven miles south-east of Edinburgh), Langlands was told by the chaplain that the letters could not be executed until after high mass; when mass was finished there appeared a band of local people under the leadership of 'the Abbot of Unreason of Borthwick' who marched the macer down to the mill stream and gave him a ducking. Undeterred, Langlands emerged and again attempted to secure execution of the letters but this time the 'abbot' seized them, tore them up and mixed them in a cup of wine which the unfortunate officer was obliged to drink. When Langlands finally made his escape it was to the accompaniment of threats of like treatment to anyone else so rash as to appear with letters from the official.[2] This is a delightful glimpse of the

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1. The first George Hay of Menzion was brother to Margaret Hay who married the 4th Lord Borthwick in 1491 (The Scots Peerage, ed. Sir J. Balfour Paul [Edinburgh, 1904-14], viii, 432). The action is first found on 8 November 1546 (Acta I, fo. 11r) when George Hay produced an act of remission following the desertion of an appeal by Borthwick to the official principal, and the case was then continued at the point at which it had been suspended on 27 May 1546; it finally reached sentence on 9 August 1548 (ibid., fo. 435r).
2. Acta I, fo. 161v. This is a popular story: it was related by Walter Scott in the notes to his novel The Abbot (see below, p.283n). and from this source it was quoted in C. Rogers, Social Life in Scotland (Edinburgh, 1884), ii, 325-6, and in Scots Peerage, ii, 109-10.

background against which the church courts had to work, and a reminder that the church had always to contend with the more pagan celebrations beloved by ordinary people. A statute of the thirteenth century had utterly forbidden the feast of fools (festum stultorum),[1] but it would seem to have had little effect. St Salvator's college was electing its 'boy bishop' in the fifteenth century,[2] while the election of an abbot of unreason was so well established in Haddington that in 1537 George Richardson was fined two pounds for refusing to play the role.[3] It may have been escapades like that at Borthwick which prompted parliament in 1555 to forbid the elections of Robin Hoods, Little Johns, abbots of unreason and queens of the May.[4] It is hard to tell how much such demonstrations really represented popular opposition to the church. Sir Walter Scott felt that the church was ready enough to tolerate such mockery of religion until the spread of reformed opinion made this revelry the means by which the common people testified to 'their utter disregard for the Roman priesthood and its ceremonies';[5] the reformers took the line that the abbots of unreason were like the real clergy, 'subdued to no laws'.[6] Probably the church did the only thing possible in tolerating in practice these events, but the spread of reformed opinion must have increased the danger of their degenerating into displays of anti-clericalism.

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1. SES, ii, 52.
2. Ibid., ii, 277.
3. Rogers, Social Life, ii, 324.
4. APS, ii, 500.
5. W. Scott, The Abbot (Illustrated Edition, 1879), i, 364 n. E.
6. Knox, Works, i, 40.

It was perhaps asking for trouble to attempt to serve papers on Lord Borthwick just when his tenants were celebrating a feast of fools, but this incident was only the most colourful of a number in which court officers were subjected to harassment or violence. Nicholas Ramsay of Dalhousie was accused of obstructing the execution of the official's letters,[1] while another macer of the Lothian court, Robert Denis, gave testimony that his letters citatory had been violently torn from his hands by one Thomas Allan.[2] One priest had to take refuge in his own kirk from the menances of the man he had just served with a summons,[3] although even that sanctuary was not always respected; the bearer of letters of excommunication issued by the official of Glasgow was dragged out of the church of Durisdeer by his hair before he could secure execution, and the threat by armed men of further violence obliged him to surrender his papers in the churchyard.[4]

Such evidence certainly suggests that there was scant respect for the processes of the church courts, but we should not ignore the context of incidents like these. In the first place,

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1. Acta I, fo. 5r, Abbot of Newbattle v. Ramsay; cf. above, 161.
2. Ibid., fo. 55v. Sir John Wilson, chaplain, testified to a similar experience on 29 October 1546 (ibid., fo. 9r).
3. Sent. Laud., fo. 334r. The man's words were reported thus: 'Trumpour [worthless], harlot, lowne [lecher] priest that you are! Wherefore have you summoned me? By the wounds of God, had you forth of your kirk it would be the dearest summons that ever you made, false, lowne priest that you are!'
4. St A. Form., ii, 21-22. Such hostility was not confined to the lay community: even the servants of a bishop are found assaulting Archbishop Forman's officers (ibid., i, 94-96).

this type of violence was not directed solely against the representatives of the court spiritual. In March 1546/7 the privy council took steps to deal with the fact that:

> 'thare is grete and hie attemptatis done and committit aganis our Soverane Lady, my Lord Governour, and the auctorite, in the handilling, stryking, mannascing, bosting, persewing, and disobeying of hir hienes officeris, sik as heraldis, masseris, pursevantis, and messangeris and uthairis our Soverane Ladyis officiaris, and taking of their lettres fra thame in the using and execution of thare offices, quharthrow thair is engenderit grete inobedience'.[1]

The measures that were subsequently proposed offered the same protection to church officers as to royal officers, suggesting that both services faced similar problems.[2] Secondly, we should remember the great hostility that has always been shown to the bearers of writs, summonses, citations or any other unwelcome document; certainly the threats and, indeed, violence which are encountered in our own day by bailiffs, process-servers and even traffic-wardens are no indication of widespread revolt against the civil authority. What the evidence does perhaps suggest is that in situations where court processes were likely to encounter resistance the church judicial could not hope to be accorded the greater respect due to the church sacramental, but it does not necessarily indicate a particular disrespect for the church as a whole, or for the ecclesiastical jurisdiction as opposed to the jurisdiction of any other court.

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1. RPC, i, 60.
2. Ibid., i, 65.

The most serious threat to the effective operation of the church courts was probably not so much violence as non-co-operation. It was noted earlier that the non-appearance of cited parties and witnesses seems to have been the particular affliction of church courts in general,[1] and it was undoubtedly true of the Lothian court in particular. The most obvious examples of this are found in those actions where a priest or a religious house was pursuing unpaid teinds (such as the action of Newbattle Abbey against Nicholas Ramsay and his tenants in which the judge decreed letters on four contumacious witnesses and against all twenty-one defenders for not replying to the petition),[2] but it was a problem found in all types of case. Between October and December 1546 there were 152 actions initiated which went beyond the stage of registration; in forty of these actions one or more of the parties failed to appear at some point (usually the defender, but in six cases it was the pursuer who was absent), and in a further ten there were witnesses who were declared contumacious on the grounds of non-appearance. Only eight of these fifty actions were initiated by a clerical pursuer. Once again, however, there is no reason to believe that this problem was confined to the church courts[3] where also the reluctance of suitors to appear when required resulted in 'huge lists of absentees'.[4] Balfour notes that any cited witnesses who remained absent would be summoned again under

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1. See above, 201-2, 213-14.
2. Acta I, fo. 13r.
3. E.g. Fife Court Book, 164-5, 228, 231.
4. Ibid., lxxxii.

'greater pains' and finally put to the horn,[1] while the records of the court of session[2] and the privy council[3] both contain examples of witnesses failing to appear at the appointed time. Nevertheless, this particular form of disobedience can only have exacerbated the delays to which the procedure of the church courts was already all too vulnerable.[4]

2. CRITICISM OF THE COURTS

Popular resistance to the processes of the church courts was perhaps more dramatic than really significant, inasmuch as it seems to have been directed against all courts in general rather than against the courts spiritual in particular. Nevertheless there was, undoubtedly, much serious criticism of the church courts, criticism that was chiefly directed against the complexity and delay of court procedure but which also raised moral questions of inequity and oppression.

A number of attempts were made to improve court procedure. In 1427 it had been the 'troubles and expenses' of poor litigants that had prompted parliament to press for an abbreviated process;[5]

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1. BP, ii, 354.
2. E.g. Acta Sessionis (Stair), 84, 140, 162.
3. E.g. RPC, i, 214.
4. Non-appearance would not necessarily have been the result of disobedience; individuals might live at some distance from Edinburgh, while weather or conflicting obligations must often have made punctual appearance difficult.
5. See above, 191.

in 1540 it was the endless delays of appeals to Rome that were at issue, and parliament authorised intervention in cases where a commission for judges delegate had not arrived within a year and a day of application.[1] In 1559 the temporal lords complained to the queen that 'puir men havand just cause oft tyme ar constrenit to all fra thar rightuous action through lengthning of the saidis process and exorbitant expences' and they recommended that the making of an appeal to Rome should no longer be able to suspend execution of the original sentence.[2] Reference to Rome was a particular source of grievance but the delays of ordinary procedure were also widely criticised; in David Lindsay's satire The Three Estates a frustrated litigant complains:

> 'Thay gave me first ane thing they call citandum,
> Within aucht days I gat bot lybellandum,
> Within ane moneth I gat ad opponendum,
> In half ane yeir I gat interloquendum,
> And syne I gat, how call ye it? ad replicandum'.[3]

He eventually paid for twenty-four acts of court and got no satisfaction. Another character in the poem recalls a man who expended half his herd in the vain attempt to recover a cow. The diets mentioned by Lindsay are quite accurate and indeed he could, as we have seen, have doubled the number of diets without in any way stretching our credulity. His technical information may well have been gathered at first hand since he himself pursued at least two

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1. See above, 248n.
2. SES, ii, 149-50.
3. Lindsay, Works, ii, 289, ll. 3063-7.

actions for the recovery of teinds in the court of the official principal,[1] and he was probably no stranger to the ecclesiastical process.

The church could not remain deaf to the mounting criticisms of its courts and procedure, and the statute of 1549 which attempted some reforms was specifically framed 'for the shortening of processes'.[2] This was no easy task. The statute did not attempt to revise plenary procedure (although the judge could abridge it at his discretion), but concentrated on the summary procedure which was to be followed in all actions relating to money or goods of twenty pounds value or less.[3] The important feature of this statute was that it enabled an action to be carried through to a conclusion even if the opposing party remained absent throughout, and in the light of the frequent non-appearance of parties this was clearly a useful innovation.[4] Beyond this, however, the statute offered little improvement and the church must have realised how little in fact it could do; it was shackled by the very complexity and technical sophistication of church court procedure which had from an early date made the ecclesiastical lawyers pre-eminent in their field.

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1. Sent. St A., fos. 39v, 54r. Lindsay's use of the despised consistory court when convenient is entirely consistent with his ambiguous position with regard to the Reformation as a whole (cf. Br. Kenneth, 'Sir David Lindsay, Reformer', Innes Review, i [1950], 79-91).
2. 'Pro abbreviatione processuum' (SES, ii, 124).
3. It is interesting to note that the statute takes action for debt as its standard.
4. See above, 232-3.

There were two particular problems inherent in the canonical procedure. The first was that reasonable delays were an evisaged part of the process of justice; J.E. Sayers has noted that 'legal delays, which were an integral part of the procedure by libel, were an essential device to protect all concerned, plaintiffs, defendants and judges'.[1] Certainly this element of protection was important, although unreasonable delays could have precisely the opposite effect. Secondly, and more fundamental, was the emphasis placed on providing safeguards for the defender at every stage of the process. For every diet allowed to the pursuer to present and prove his claim there was a diet allowed to the defender to object or make contrary allegations. Any reasonable exception that was admitted for the defence would be contested on the same principles as the primary action (with the original pursuer now having the privileges of the defender) and had to be disposed of before that action could be resumed.[2] For every answer of the defender the pursuer would have the opportunity 'ad replicandum', and so on through the stages of duplication and triplication;[3] and all this could take place within the terms of 'summary' procedure. This was the real weakness of the 1549 statute; if the defender proposed 'contrary articles' he was to be allowed a 'short term for proving them together with his objections to individual witnesses, his peremptory exceptions and all those pleas which he may demand

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1. Sayers, Judges Delegate, 99.
2. See above, 219-30.
3. See above, 229-30.

in arguing his cause',[1] and at the end of the statute all attempt at controlling the proliferation of diets is abandoned when it is conceded that in all matters due observance must be given to 'the laws, the defence of parties, replies and duplies according to the dicretion of a good judge'.[2]

That church court procedure was cumbersome and an object of much criticism is clear, but it is less easy to be certain of the extent to which it proved an obstacle to justice. If there was a will to obstruct in one or other of the parties to a dispute then the means were probably not hard to come by. An aggrieved litigant complained to the lords of council in 1542 that his opponent, although 'acted' for an obligation in the official's books and currently under sentence of cursing, had sustained 'the said process for the past ten years'.[3] The lodging of an appeal could, as we have seen,[4] lead to serious delays in the settlement of a dispute and even (if the absence of any prompt move to have the appeal deserted is any indication) permanently frustrate it. There may also have been long delays in the settlement of ordinary first instance actions. When Margaret Gardin was finally exonerated as the executor of William Auchterlony of Kellie in January 1541/2, one of the sums accounted for was the forty-five pounds which had been

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1. 'Brevis terminum ad probandum eosdem una cum oblatis contra personas testium et peremptoriis ac omnibus juribus, quibis uti voluerit in causa procedendum' (SES, ii, 125).
2. 'Salvis legibus ... partium defensionibus, replicatis, duplicatis ex arbitrio boni judicis necessariis' (ibid., ii, 125).
3. ADCP, 518.
4. See above, 248-9.

owing to Edward Auchterlony from the time of his kinsman's death in 1529 until eventually recovered by a sentence in 1538.[1] In another action the judge deliberated for four months on the question of whether or not one of the parties should be re-examined on a point that remained obscure;[2] and it took Edward Sinclair fourteen diets spread over six months to bring George Henrison of Fordell to answer his initial libel.[3] Such examples can be multiplied, but it is difficult to say whether they are in fact representative of the usual progress of an action in the officials' courts, mainly because it is hard to define just what was 'usual'. Some actions might involve more than twenty separate diets,[4] while many involved only two or three;[5] there is also the added complication that only a tiny proportion actually reached sentence or some other recorded conclusion. The question of the 'representative action' must therefore be considered - firstly with regard to its probable duration, and secondly to its conclusion.

A large number of the entries in Acta I which record the registration of a libel, a petition or a cedula are not followed by any subsequent action; in the case of the period between October and December 1546 such cases accounted for 104 of the 256 new actions registered. In the remaining 152 the number of subsequent diets

1. Sent. St A., fo. 12v.
2. Acta I, fos. 102v, 200v, Ker v. Lauson.
3. Ibid., fos. 17r, 169r.
4. E.g. Wardlaw v. Wauchop (begun ibid., fo. 6v), Ker v. Lauson (begun ibid., fo. 28r).
5. Of the 152 actions which proceeded beyond an initial registration fifty had only one subsequent diet, and twenty-three had only two.

varies enormously but it is possible to discern some common features. The average number of diets per contested action during this period was almost exactly five, and even this figure is reduced by half if we exclude the thirteen actions which involved more than ten diets each. The time elapsing between these diets is also significant and here there is greater consistency. If we take the average number of days intervening between the diets of each individual case, we find that in more than sixty per cent of the actions the average interval between each diet was eight days or less,[1] while in only ten per cent did the interval exceed fifteen days.[2] If we exclude this ten per cent we find that the average interval between diets in these actions as a whole was about seven days. Given that the average number of diets per action was between two and a half to five, we arrive at an average duration per contested action of between fourteen and thirty-five days. Such academic figures should be treated with caution, but the result is not in fact inconsistent with the general evidence of Acta I; certainly there is little evidence to support Lindsay and his talk of a half year between diets.

There is good reason to believe, therefore, that few actions in the court of the official of Lothian were in progress

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1. A diet was frequently assigned 'ad octavum' - that is, to the same day the following week. When this day happened to be a dies non sessionis the diet would be held the following day, so a week's interval often lasted for eight days. Terms of six and eight days were themselves not infrequently assigned.
2. That is, in excess of a fortnight allowing an extra day for a dies non sessionis.

for much more than a month, but there is little profit in a prompt and speedy contest if no settlement is achieved at the end of it. Of all the actions begun between October and December 1546 only three reached a recorded sentence. One ran from 8 November to 26 May 1547 and involved nine diets,[1] while a second was begun on 2 November and reached sentence on the following 23 March after eleven diets.[2] The third was the action of Andrew Blackstock and his wife Isobel Lauder. Begun on 19 October it was assigned a diet for sentencing on 15 February 1546/7 which was adjourned a fortnight later 'sub spe concordie';[3] this hope may have been fulfilled for there is not a trace in the Act Book of the sentence which is recorded in the Sentence Book.[4] The action of George Hay against Lord Borthwick also came to sentence, on 9 August 1548, although it was not actually initiated in our period; it had been resumed in October 1546, following the failure of Borthwick's appeal to the official principal, at the point at which it had been

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1. Newton v. Scott. The opening of the action is recorded on Acta I, fo. 11v; the sentence appears on Sent. Laud., fo. 337r, but is subscribed 'hec sententia non est lata causante concordia inter partes ante ejusdem pronunciationem', which accounts for the fact that the sentence does not appear in the Act Book. An act of monition against the defender to pay the pursuer fifty shillings was recorded on Acta I, fo. 173v.
2. Sandelandis v. Biggar, Scott and Child (ibid., fos. 9v, 115Av; Sent. Laud., fo. 336r).
3. Acta I, fos. 3r, 70v, 132r; twenty-one diets were involved.
4. Sent. Laud., fo. 336v. It would seem from the evidence of Newton v. Scott (see above, n.1) that the entries in the Sentence Book were made before sentence was actually pronounced in court. In any case, whatever concord was achieved in Blackstock's case did not last long; a new petition on the same matter was brought on 2 January 1547/8 (Acta I, fo. 261v) and was still being contested when the suit last appeared on 2 May 1548 (ibid., fo. 389v).

interrupted in May 1546 and there is no way of knowing how long it had been in progress before that.[1]

Sentences were not unheard of, as is amply proved by the Sentence Books, but they were clearly few and far between. On the evidence of the autumn term of 1546 the odds seem to have been that only about one in eighty actions would achieve this conclusion.[2] Nevertheless, quite a number of actions do seem to have reached some sort of settlement. Eleven disputes appear to have been conceded, resulting in an act of monition against the defender;[3] in fifteen cases where a cedula was put to an oath there were eight denials of the claim,[4] four admissions[5] and three entries which merely record that an oath was given.[6] Three petitions for the transfer of a contract were successfully completed.[7] In three instances a term was assigned for sentencing but was not followed by any further entry, suggesting that a compromise was achieved,[8] while on another occasion two parties agreed to submit their dispute to the decision of arbiters.[9] Things did not always go so smoothly: in one instance

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1. Ibid., fo. 11r.
2. This does not seem to be unrepresentative of this period. Acta I records only twenty-nine sentences for the whole twenty-nine months that it covers (but cf. below,
3. E.g. Scott v. Ahannay (Acta I, fos. 11r, 25r).
4. E.g. Thomson v. Cass (ibid., fo..28v), Cairns v. Smyth (ibid., fos. 38r, 42r).
5. E.g. Meldrum v. Gudlac (ibid., fos. 15v, 21v), Thomson v. Cranston (ibid., fo. 28v).
6. E.g. Mudy v. Purdy and Halliday (ibid., fos. 22r, 29r).
7. E.g. Kadislie v. Cook (ibid., fos. 15r, 19v).
8. E.g. Lauder v. Moreston (ibid., fo. 56v).
9. Dikson v. Lauson (ibid., fos. 8r, 9r).

an action had to be suspended when the defender was sent to England in the service of an ambassadorial retinue;[1] in another a procurator applied to have his client repledged to the exempt jurisdiction of Corstorphine,[2] while in a third the action was inhibited pending an appeal to the official principal.[3] In four more actions the defenders made pleas for their expenses following the failure of the pursuers to appear.[4]

The fate of those actions which did not reach some recognisable form of conclusion is more problematical. It may have been that where the opening of an action was recorded simply as 'X proposed a libel against Y', without the assignation of any subsequent diet, it was not actually intended to pursue the matter at that particular moment. There were seventy-one such entries during the autumn of 1546 and of these only eleven were followed by further legal proceedings. They may perhaps have been intended only as warnings to a defaulting party, or as safeguards which allowed for the prompt undertaking of a legal action if it should prove necessary - a purpose similar to that of an act of monition but one which did not require the consent of the other party. The fate of those actions which lapsed after one or more subsequent diets must remain a matter for speculation. No doubt the threat of a prolonged action would

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1. Matheson v. Thomson (ibid., fos. 5r, 7r).
2. Makinath v. Polwarth and West (ibid., fo. 52v). The claim was made by the defenders' procurator, John Peebles, as 'bailie of the lord of St John of Corstorphine'; as the action does not reappear the tactic may have been successful.
3. Wilkeson v. Wynram and Simson (ibid., fo. 41r).
4. E.g. Blackadder v. Blair (ibid., fos. 16v, 20v), Ker v. Mossman (ibid., fos. 29v, 35r, 37r).

sometime have been sufficient to achieve satisfaction from a reluctant debtor; on other occasions the parties may have come to an acceptable compromise. There must, however, have been some actions in which the tortuous procedure of the church courts exhausted either the patience or the resources of a litigant and caused him, in the words of the temporal lords, 'to fall from his righteous action'.[1]

Sooner or later most of the critics arrived at the same conclusion - that the church courts oppressed the poor. This is a difficult charge to prove one way or the other but some attempt must be made to consider its justification. There is no doubt as to where Henryson stood: to him the church court was the 'cursut consistorie', corrupt and prejudiced, which denied justice to the poor sheep. Henryson's charge is vivid and dramatic, but on reflection it is not a convincing one. This is partly because Henryson's satire is directed against so broad a target; it includes the sheriff court as well as the consistory and its chief theme is that both of them oppress the 'poor commons' regardless of which jurisdiction they represent. Furthermore the depiction of the ecclesiastical judge as the arch-villain of folklore, the Wolf, together with the accusations of venality and prejudice, paint a picture which is not reflected in the more serious criticism of the time. Neither parliament nor the temporal lords[2] impugned the quality

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1. SES, ii, 149.
2. See above, 287-8.

of the judges spiritual, nor do the ecclesiastical statutes (which were not ashamed to denounce the licentious priest or the corrupt dean) offer any complaint against the officials.[1] Even John Knox, who had a keen eye for any ecclesiastical weakness, found nothing worse to say about the spiritual judges than that they were too free with their cursing.[2] More positive evidence in favour of the courts is hard to find but it must suffice at this stage to note that there is no evidence of widespread corruption in the church courts prior to the Reformation, despite the satirists' claims to the contrary.

A more difficult question concerns the extent to which the church courts, by the complexity of their procedure, discriminated in favour of the richer members of society. We have already seen how little evidence survives of the scales of charges in the officials' courts[3] and this precludes any clear picture of the cost of litigation. Occasionally, however, an entry in Acta I records the judge's estimation of costs after the conclusion of an action. These costs would seem to represent the expenses incurred during the suit by the successful party rather than the general fees of the court; the litigant in Lindsay's satire quite clearly paid

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1. In 1559 it was declared that all officials should be priests and suitably qualified (SES, ii, 172), so perhaps not all ecclesiastical judges were as well qualified as the St Andrews officials.
2. Knox, Works, i, 37-39.
3. See above, 127-8.

for each separate act of court as he went along,[1] and it is unlikely that the payment of procurators, clerks and macers could be delayed until after sentencing - months or even years after the commencement of the action, if ever. The costs of one action in the Lothian court which ran for three months were assessed at nineteen shillings, which averaged about two shillings for each of the ten effective diets;[2] in another the costs averaged about two shillings and sixpence for each diet.[3] In the Dunblane court final costs could be estimated at anything up to fifty shillings,[4] and this sum may well have not included the fee charged for sentence; in one case a decree of costs of twenty-six shillings was followed immediately by an act of monition against the loser for the payment of a further seven shillings and eightpence to the clerk of the court for sentence,[5] although this may have been a practice peculiar to that court. Owing to the infrequency of sentences few litigants can have expected to have the satisfaction of hearing their costs awarded against their adversaries, and so the expenses of litigation had to be a real consideration from the very beginning of a legal action. When we consider that at about this time workmen on royal

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1. 'And than thay gart me cast out mony plackis,
   And gart me pay for four-and twentie actis:
   Bot, or thay came half gate to concludendum,
   The feind ane plack was left for to defend him'.
   (Lindsay, Works, ii, 289, ll. 3069-72).
2. Jak v. Warrok (Acta I, fos. 146v, 211r); costs were decreed on 4 August 1547 (ibid., fo. 217r). 'Effective diets' - that is, excluding those entries which merely record that the diet assigned to that particular day had been postponed.
3. Carnoquhin v. Brown and Pentland (Acta I, fos. 50v, 346r, 350r).
4. Dunblane Acta, fo. 350v.
5. Ibid., fo. 191v.

building projects were receiving about five shillings weekly, and skilled workers averaging about ten to fifteen shillings,[1] the problem can be seen in some perspective. The sums mentioned in the records were clearly not exorbitant, but equally clearly there must have been a substantial class of people for whom litigation in the church courts, at least by plenary procedure, would not have been possible.

Financial considerations, therefore, may provide a partial explanation of why so many actions disappeared after progressing through only a few procedural stages. It is interesting in this respect to consider the types of people who not only raised actions in the officials' courts but also obtained sentences. Over eighty per cent of the 256 actions raised in the autumn term of 1546 were brought by laymen of no recorded rank or distinction as opposed to less than five per cent which were brought by people either distinguished by the territorial 'de' or described as burgesses; the remainder were brought by clerical pursuers in the widest sense - religious houses, rectors, chaplains and parish clerks. If we turn to the 385 sentences passed in the same court between 1539 and 1551 we find that the share of the 'commoners' has fallen to about sixty per cent with the other two groups accounting for about twenty per cent each. In the court at St Andrews the 383 first instance sentences were divided approximately equally between the three categories.

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1. Accounts of the Masters of Works, 1529-1615, ed. H.M. Paton and others (Edinburgh, 1957), xliii.

These figures are not altogether surprising. Those most likely to pursue an action through all the successive stages of plenary procedure (and it is plenary actions that account for the great majority of sentences) would be those with the greatest means; equally, it would be these people for whom the advantages of a definitive sentence, formally pronounced and recorded, would seem most attractive. Nevertheless, we can make no rigid distinctions between the people who did eventually obtain sentences and those who did not. Those who did not pursue their actions to the point of sentence, and indeed those who were undistinguished by name or rank, were not necessarily paupers; there is no trace of any plea being brought 'in forma pauperis', which was an occasional feature of the English courts,[1] and the very goods and moneys which were the preoccupation of so much legal effort are indications of means, however modest. When the temporal lords raised their complaints on behalf of the 'poor man', it was not the real poor that they had in mind but more probably those sections of the community able to contest a suit by plenary procedure and whose grievances perhaps owed as much to an inability to obtain prompt and speedy settlements as to any difficulty in meeting the bills.[2]

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1. Woodcock, Canterbury, 62; Houlbrooke, Church Courts and People, 51.
2. The temporal lords can hardly be accused of self-interest since they were not frequent litigants before the officials: only three members of the nobility obtained sentences before the official principal 1541-1553 - the Earl of Sutherland, Lord Methven and Lord Lindsay of the Byres (Sent. St A., fos. 270v, 216r, 122v); and there were only three in the Lothian court 1539-1551 - the Earl of Glencairn, Lord Herries and Lord Somervell (Sent. Laud., fos. 352r, 300v, 305v).

In acknowledging the discrimination that was the inevitable result of the prolixity and expense of church court procedure we come close to admitting the validity of the satirists' charge that there was oppression by the denial of justice to the poor, but this does not necessarily follow. As we have seen, there were at least three judicial processes available in the church at minimal cost. The first was the system of acts of monition which accounted for a large part of the business of the Lothian court and probably for the greater part, if we may judge by the example of Dunblane, of the business of the less important courts.[1] While this procedure was essentially a preventative one, it was able to give even quite minor transactions a degree of certainty based on the promise of future judicial sanction. Secondly, there was the procedure that involved the presentation of a written cedula to the oath of another party.[2] This system was not perfect and it could itself lead to a prolonged legal contest;[3] but it could also lead to a speedy settlement, even within the space of one diet, and it seems to have been not without effect. Thirdly, an action could be registered in the Act Book as a means of bringing pressure on an adversary; while there is no means of deciding how effective this might have been, the very large number of entries which are followed by no subsequent legal action seems to argue in its favour, since it is unlikely that in each of these sixty actions[4] a legitimate intention to pursue was frustrated by lack of money. Where the

1. See above, 181.
2. See above, 234-6.
3. The action of Jak v. Warrok (see above, 299n.) began with a cedula but the disputed sum was the relatively large one of fifty shillings.
4. See above, 296.

court would have failed the poor man would have been in its inability to provide redress in the case of an unanticipated injury at the hands of a wealthy and unrepentant foe.

3. ECCLESIASTICAL SANCTIONS

A court is only as effective as its ability to enforce its decisions, and in the matter of enforcement the officials' courts appear to have laboured under a particular handicap. In cases of defamation, which was essentially a disciplinary offence, penances could be imposed on the guilty party or fines levied in compensation for the injured,[1] but in most actions it was the settlement of a dispute that was required, not the punishment of criminals, and the only sanctions available to the church were ecclesiastical censures.

The full process of excommunication, or cursing, involved a series of progressive steps of increasing severity which could be applied to cleric and layman alike. A famous example may be found in Cardinal Betoun's summons of Archbishop Dunbar of Glasgow to a council in 1546, in which the threat of excommunication was intended to forestall any disobedience on the part of the archbishop.[2] The

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1. See above, 155.
2. SES, i, cclx-cclxvi. Disobedience might reasonably have been expected since the summons followed so soon after the unseemly clash in Glasgow cathedral between the retinues of the two archbishops (ibid., i, cxxxii), but in fact all the clergy were summoned to the council under the threat of excommunication (ibid., cclxvii-cclxix).

summons threatened in turn an interdict forbidding entry into church, suspension from divine rites, excommunication, aggravation, reaggravation and interdict; each stage was to follow an interval of six days.[1] These terms may require some explanation. In the case of Archbishop Dunbar the first two stages are straightforward, although they might more normally be combined in the single penalty of suspension or personal interdict;[2] possibly the cardinal was unwilling to proceed too swiftly to the excommunication of his 'brother in Christ'. The effect of excommunication was to cut off the excommunicate from the sacraments of the church - from baptism, confirmation, the eucharist, penance, extreme unction, orders and matrimony.[3] For a priest the ban was on both 'passive' and 'active' communion, or in other words he was unable either to receive or administer the sacraments.[4] Some variations of the penalty of excommunication do occur. The penalty of 'minor excommunication' was sometimes specified, but this implied only the

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1. The intervals between the successive stages remained the same during the course of any one process but was not necessarily fixed at six days. In Dunbar's case the peremptory citation allowed two days for each of the three canonical warnings (see above, 200) but the admonition to non-resident clergy allowed ten days for each warning, resulting in thirty-day intervals between each stage (St A. Form., i, 15-17). The process against the abductors of the Dean of Merse allowed only three days for each complete warning, while their associates were given just twenty-four hours as a peremptory warning to sever all relations with them (ibid., i, 84-89).
2. 'Personal interdict', 'minor excommunication' and 'suspension' all referred effectively to much the same process (cf. Reichel, Canon Law, ii, 139-40). Suspension was the first stage in the censure of the Bishop of Argyll (St A. Form., i, 120).
3. The term 'sacrament' had a wide application, especially in the earlier mediaeval period. The seven traditional sacraments were enumerated by Peter Lombard and eventually affirmed by the councils of Florence and Trent.
4. Cf. Reichel, Canon Law, ii, 140.

restrictions of suspension.[1] There was also a distinction between excommunication and anathema. Anathema had formerly been a separate penalty,[2] but by the late mediaeval period had come to signify the solemn infliction, as opposed to the non-solemn infliction, of excommunication. Excommunication was a penalty imposed by the community of the christian faithful, and it could be inflicted either by a representative of that community (such as ecclesiastical judges) or by the community as a whole. In the latter case the penalty was imposed with great ceremony by a specified number of priests and assistants, representing the faithful, and with all the ritual of bell, book and candle; this ceremony was the solemn infliction of excommunication, or anathema.[3] Finally, not all excommunications were aimed at specified individuals; excommunication 'a jure' or 'a canone' could be made generally against various categories of people and would be pronounced in churches at regular intervals during the year.[4]

The process of aggravation, which succeeded excommunication, is more difficult to define precisely. Although it may itself have involved further restrictions on the excommunicate the application of aggravation in sixteenth-century Scotland seems to have been more as a warning of more severe penalties to come.[5] These penalties

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1. DDC, v, col. 616 (cf. above, 304n).
2. DDC, i, col. 515.
3. Reichel, Canon Law, ii, 141-2. Thus the abductors of the Dean of Merse suffered excommunication and anathema (St A. Form., i, 85).
4. Cf. Patrick, Statutes, 18 n. For a form of general excommunication see SES, ii, 6-8.
5. Cf. DDC, i, cols. 353-4.

were imposed by the process of reaggravation which was designed to isolate the excommunicate from all christian society. In the case of the abductors of the Dean of Merse this new stage was marked by a further ceremony, similar to that of the anathema, and which was concluded by the casting of three stones from the doors of the church in the direction of the homes of the excommunicates as a symbol of their eternal damnation. Warning was then given to all the 'christian faithful' that within twenty-four hours all communication with the outcasts should cease; none should 'serve them or greet them, sit, stand or walk with them, entertain them, eat or drink with them or provide them with food, drink, water or fire', and they were to have no human solace whatsoever.[1] Anyone disobeying this would themselves suffer the pains of excommunication. However, even the terms of the reaggravation were exceeded by the final and most far-reaching curse of all, one that transformed the social outcast into a leper who spread the symptoms of his own damnation as he travelled. The effect of the interdict was to suspend divine rites, close the churches and forbid the administration of the sacraments in every town, parish, village or community through which the excommunicate might pass or in which he might reside, and the ban remained in force for a full three days after he had departed.[2] Clearly, such a penalty could be put to terrible effect if its terms were strictly enforced.

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1. 'Nec cum eiis vel eorum aliquo serviendo salutando loquendo stando sedendo ambulando hospitando commendo bibendo conversando coquendo, cibum vel potum aquam vel ignem ministrando, aut aliquo humanitatis solatio preterquam in casibus et personis a jure permissis participare quovismodo presumant seu presumat' (St A. Form., i, 87).
2. E.g. SES, i, cclxv-cclxvi; St A. Form., i, 89.

There is no doubt, however, that the value of excommunication in all its forms had been considerably debased by over-use. Even the reformers admitted that, if properly used, cursing 'was the moist fearfull thing upoun the face of the earth; for it was the verray separatioun of man frome God';[1] but Knox relates that a letter of cursing could be bought for a plack (fourpence) to last a year, and that parish priests regularly pronounced excommunication on such weighty matters as the theft of a spurtle or a horn spoon.[2] The evidence of the court records suggests that excommunication was indeed a standard procedure and that it could be incurred in a number of ways. As a judicial sentence it was regularly employed in cases of non-payment of teinds although, as we have seen, it only followed the due process of monitorials and it would not be imposed if the preliminaries had not been properly performed.[3] Excommunication was also the penalty imposed on those who obstructed or assaulted the court's officers or who destroyed official documents,[4] but it does not otherwise seem to have been regularly imposed as a judicial sentence. This is partly explained by the church's attitude to censures. Although they were widely used and abused in the later mediaeval period, ecclesiastical censure had from an early period been regarded as essentially 'medicinal';[5] although we talk of penalties and sentences, the purist would always have regarded cursing as a stimulus to repentance rather than as a vindictive punishment.

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1. Knox, Works, i, 38.
2. Ibid., i, 38-39. Cf. Donaldson, Reformation, 41.
3. See above, 162.
4. Cf. above, 284-5.
5. Cf. Reichel, Canon Law, ii, 138.

Ecclesiastical censure, or at least the threat of it, occurred more frequently during the course of an action, to compel the attendance of a party or witness, or the performance of some duty required by the court. The phrase 'judex decrevit litteras' occurs in almost fifty of the actions commenced during the autumn of 1546. On occasion an additional note will offer a reason such as 'for not replying to the articles' or 'because he refused to give his oath';[1] sometimes the letters were decreed against contumacious witnesses,[2] and they could also be conditional on the party or witness concerned appearing at the next assigned diet.[3] It is not, however, made clear in the entries as to precisely what censure was contained in such letters, or whether the censure was imposed or merely threatened. It seems likely that such letters did in fact impose the penalty of suspension ab ingressu ecclesie. This was the usual first step against obstinate witnesses in the Canterbury courts,[4] and in the Lothian court records there are a number of occasions where a witness, against whom letters had been decreed, appears in court to be absolved,[5] while a party might appear to be absolved 'for not replying to the articles'.[6] On only one occasion is the penalty involved specified as that of excommunication and that occurred in a case where witnesses had remained contumacious over the period of more than one diet.[7]

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1. E.g. Acta I, fo. 23v, Meldrum v. Hepburn; ibid., fo. 35v, Flynt v. Remmege.
2. E.g. ibid., fo. 28v, Murray v. Fairlie.
3. E.g. 'decretis litteris super dicto Lauson si non comparuerit' (ibid., fo. 47r, Ker v. Lauson).
4. Woodcock, Canterbury, 93.
5. E.g. Acta I, fo. 28r, (cf. below, Appendix IV, 369).
6. E.g. ibid., fo. 31v, Murray v. Fairlie.
7. E.g. ibid., fo. 27r, Wardlaw v. Wauchop.

Most incidents of excommunication seem not to have depended on actions contested in the courts. Most contracts, agreements and monitions (with the exception of those in Acta I) were registered in the court books under pain of excommunication. We have no means of knowing how many of these agreements were broken or how many people incurred excommunication as a result,[1] but a number of sentences which record the absolution of a party from the censure incurred by virtue of a monition or for the non-fulfilment of a contract suggests that it was not an uncommon occurrence. The sentences of absolution often refer to the penalty having been imposed by virtue of letters raised by the opposing party,[2] and this would seem to have been the customary procedure in cases where a registered agreement had been broken; the cost of raising 'letters excommunicatory' may have been more than the 'plack' claimed by the reformers, but it was probably not very great.

These sentences of absolution, and the related petitions for absolution that we find registered in the Act Books, are interesting also in that they show that many people had a sufficient regard for the church's censures as to go to some considerable trouble and expense to have them lifted. Petitions for absolution were generally brought to amend the effect of an excommunication imposed

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1. The fact of an agreement not being subsequently deleted is no proof that it was not fulfilled (cf. above, 187).
2. E.g. Sent. St A., fo. 60r.

at the instance of another party. The attendance of that other party was required,[1] although his expenses were recoverable if the excommunicate failed to appear.[2] The initial petition requested absolution on the grounds that would be set out in pleas to be subsequently produced (propter jura et rationes), but which were not specified in the records, and which could be contested like any other petition. If successful the party could be absolved simpliciter[3] or for a specified reason such as the irregularity of the process by which censure had first been incurred.[4] There is, however, no trace of absolutions being given with some general expression such as 'propter motiva', an abuse which was forbidden by a statute of 1559.[5] If the petition was rejected the judge would call for a further fulmination of the sentence.[6]

It is not easy to decide how far this desire to be absolved from cursing is a reflection of its effectiveness as a spiritual penalty. The more immediate inconvenience of the ecclesiastical sanctions may have been of a more material nature since it imposed severe legal disabilities on the excommunicate in both the temporal and the spiritual jurisdictions. It had early been decided by parliament that excommunicates should not enjoy the ordinary privileges of the law.[7] According to Balfour:

> 'ane man beand accursit and excommunicat, and not ordourlie absolvit thairfra, may

1. E.g. Acta I, fo. 2v, Napier v. Cranston and Arnott; on this occasion the parties were cited by a public edict fixed to the doors of St Giles 'cum intimatione debita ut moris est'.
2. E.g. ibid., fo. 9r, Brown v. Foster.
3. E.g. Sent. St A., fo. 59v.
4. E.g. ibid., fo. 76v.
5. SES, ii, 171-2.
6. E.g. Sent. St A., fo. 4v.
7. APS, i, 744; ii, 33.

> not be himself, nor his procurator, stand in judgement to persew ony actioun or cause; and the defendar is not haldin to answer to him, as said is, untill he be absolvit, and rais and execute new summoundis aganis the defendar'.[1]

Balfour is less clear about the status of an excommunicated defender, contradicting himself in two successive statements, but he quotes a judgement of 1548 to the effect that an excommunicate may 'defend in judgement in ony cause' notwithstanding his disability.[2] The weakness of the excommunicate in litigation was that an exception of excommunication could be raised at any point in an action, before or after litiscontestation.[3] When such an exception was raised during the course of an action in the Lothian court the procurator was emphatic that it was valid at any stage of the case;[4] the exception was at first rejected, presumably because it was unsubstantiated, but when letters of excommunication which had been executed on the pursuer were produced, the case lapsed - no doubt to allow the excommunicate to obtain absolution. On another occasion an action disappeared after it had been alleged that one of the pursuers was excommunicate by letters of the official of Glasgow;[5] and in a case before the lords of council in 1528 it was objected that a certain woman was inadmissible as a witness because she too was excommunicate by the official of Glasgow.[6] The effect of this disability was,

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1. BP, ii, 290.
2. Ibid., ii, 294.
3. Cf. DDC, v, col. 621, where it is suggested than an excommunicate could in fact raise an action but that he could not be sure of seeing it through because of the exception of excommunication.
4. 'Declaratio excommunicationis in quacumque parte litis recipienda' (Acta I, fo. 65v, Sinclair v. Henrison).
5. Ibid., fo. 148v, Wr and Smith v. Machane. It was clearly important that the fact of an excommunication should be well publicised if it was to be effective.
6. SRO, Glencairn Muniments, GD39/1/43.

however, weakened by the practice of granting temporary absolutions. This expedient was probably most available to those intending to appear as witnesses, as in one instance in the Dunblane court where the commissary absolved 'all witnesses from all censures for twenty-four hours' for the purpose of giving testimony,[1] although it was sometimes enjoyed by the parties to an action also.[2] Whatever the reason for granting temporary absolutions, it was clearly a practice that undermined the effectiveness of the church's censures. There seems to be an implicit recognition of the importance of this legal element in excommunication in the statute of 1559 which declared that 'no absolutions shall be given from sentences of excommunication or other church censures, for whatever reason they may have been fulminated, even for contumacy, for the sake of raising, prosecuting or deciding an action or for exercising any other court office, except for giving testimony'.[3]

By the 1540s the spiritual sanction of excommunication may well have been as little regarded by the clergy as it was by the laity, and certainly it is unlikely that either Cardinal Betoun or Archbishop Dunbar really supposed that 'refusal by one to attend a council in the other's province involved eternal death'.[4] Nevertheless, excommunication may have been effective as a secular penalty.

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1. Dunblane Acta, fo. 42v.
2. E.g. ibid., fos. 10r, 11v, Hume v. Machane.
3. 'Nullae inposterum dentur absolutiones, a quibusvis sententiis excommunicationis, et aliis censuris ecclesiasticis, ex quacumque causa etiam contumaciae fulminatis, ad effectum agendi, prosequendi, judicandi, vel alicujus membri curiae officium exercendi, nisi dumtaxat testimonii conferendi causa' (SES, ii, 172).
4. Patrick, Statutes, lxxiv.

Parliament had declared in 1450 that, 'for the maynteinyng of the fredome of halykirk', persons remaining under sentence of excommunication without seeking absolution should have letters of caption directed against them, and if they could not be apprehended their goods would be siezed and they would finally be put to the horn.[1] As late as 1551 it was ruled that the goods of anyone remaining under sentence of excommunication for the space of a year would be forfeit to the crown.[2] When, therefore, Archbishop Forman invoked the assistance of the secular arm against the abductors of the Dean of Merse it would not have been seen as the helpless bleat of an impotent church; it was rather the execution of a proper and well-understood procedure by which the physical authority of the christian community took over where the spiritual authority had failed. In that respect disobedience towards the church courts ultimately led to the same end as disobedience towards the state and its judiciary. This factor should always be borne in mind when we discuss the authority of the ecclesiastical jurisdiction, and although it may be seen as a sign of clerical weakness and dependence on the state, contemporaries may have seen it more simply; so long as the church courts were an important part of the national judicial system it was in the national interest to see that they functioned effectively.

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1. APS, ii, 35.
2. APS, ii, 482.

4. CHURCH COURTS AND THE SIXTEENTH CENTURY

The operation of the officials' courts was clearly closely involved with the lives and affairs of the ordinary people; but the 1540s in particular, and the sixteenth century in general, were not easy times for the ordinary people of Scotland, and before concluding we should briefy consider how the courts themselves fared in these troubled years. The 1540s provided a backdrop of continual political unrest, dissension and war.[1] There was strife with England from Halidon Rig in August 1542 to Pinkie in September 1547; Edinburgh was burnt in 1544 and the borders harried and wasted both that year and the next. James V died in 1542 leaving a six-day old daughter and a government that was the constant prey of faction throughout the decade. The church was also deeply involved with politics, its fortunes waxing and waning with those of Cardinal Betoun and his supporters. Betoun himself was imprisoned in 1543 and finally murdered in 1546, shortly after George Wishart had been burned at the stake in a vain bid to halt the spread of heresy. For ordinary people life was made doubly hard by the wasting of some of Scotland's most fertile areas and by the English occupation of Haddington, 'the richest corn-growing centre in Scotland',[2] during 1548 and 1549. As a final blow the pestilence broke out in 1545 and was 'wonder greit in all burrowis townis of this realme, quhair mony peipill diet with greit skant and want of victuallis'.[3]

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1. For the political background to this period, cf. G. Donaldson, Scotland: James V - James VII (Edinburgh, 1971), 43-48.
2. I.F. Grant, The Social and Economic Development of Scotland before 1603 (Edinburgh, 1930), 232.
3. Diurnal of Occurrents, 39.

St Andrews and Edinburgh provided the principal stages on which many of these dramas were acted, and it is particularly sad that we do not have all the relevant court Act Books to give us a day-by-day account of the conduct of the courts in the most turbulent periods. If the evidence of Acta I may be taken as a guide, however, it may well have been that little of outside events would have found their way onto the pages of the court records. In Acta I glimpses of contemporary events occur only incidentally during the prosecution of suits. In one instance it was peace that interrupted a process, when it was discovered that the defender had left for London in the retinue of the queen's ambassadors,[1] but most references are concerned with war. In November 1546 an action was brought by one Robert Hardy against the executors of a merchant whose goods and household effects he had transported from Edinburgh and stored at Dalmahoy at the time the English burnt Edinburgh.[2] Hardy had evidently done well out of the popular panic: for each horse-load of 'geir and bedding' he had charged fourteen shillings on the outward journey and a further fourteen shillings for the return after the English had withdrawn 'as like persons had paid for similar services at the same time'.[3] The court itself seems to have been

1. It was resolved on 2 October 1546 to send an embassy to England in relation to the 'comprehension' of Scotland in the Anglo-French peace treaty (RPC, i, 43-44). On 21 October a petition was brought against one Peter Thomson together with a request that he should be immediately cited to all the appropriate judicial stages, for fear that he would disappear to London (Acta I, fo. 5r). It was clearly too late, for on 26 October Thomson's wife declared that he had already left 'in servicio et itinera' with the ambassadors (ibid., fo. 7r).
2. Edinburgh was burnt on 4 May 1544 and again on 7 May (Diurnal of Occurrents, 31).
3. 'Prout consimiles persone dicto tempore pro consimilibus persolvere consueverunt et persolverunt' (Acta I, fo. 22r). The goods were stored at Dalmahoy from 3 May to 3 September 1544.

less pusillanimous in the face of the enemy. In the spring of 1548 the English occupied Haddington, enabling them 'to terrorise the Lothian countryside up to the very gates of Edinburgh';[1] but a suggestion in June of that year that an action in the Lothian court should be suspended 'until the withdrawal of the English' went unheeded.[2] In the same month the lords of session decided to suspend all proceedings against anyone who had joined the governor's army - the suspension to last until ten days after their return;[3] the church court followed suit in August when the official's commissary proclaimed a general absolution for all those in the army who might have incurred the penalty of excommunication.[4]

Acta II is even less inclined than Acta I to make contemporary references, although an exception was made on 8 September 1550 by the clerk who noted the day as that of the departure of Mary of Lorraine for France.[5] For evidence of the courts' fortunes over a wider period we have to turn to the Sentence Books. These books contain little in the way of direct evidence of contemporary events, and so for our information we are obliged to look at the number and frequency of the sentences passed at different times during the periods covered by the books. The weakness here is the unreliability of the dating of the sentences, especially in the Lothian court; in

1. Donaldson, James V - James VII, 76. Haddington was of some strategic importance: Lord Grey considered 'the keeping of Haddington to be the winning of Scotland' (Calendar of the State Papers relating to Scotland and Mary, Queen of Scots 1547-1603 [CSP Scot], ed. J. Bain and others [Edinburgh, 1898], i, 131).
2. Acta I, fo. 412v, Ker v. Lauson.
3. ADCP, 575.
4. Acta I, fo. 444r.
5. 'Die navigationis regine a partibus Scocie in Francia' (Acta II, fo. 10r).

some sections dates are attached to each successive sentence, in others only every second or third entry is dated, but there are places where the sentences go undated for page after page leaving gaps of eighteen months or more.[1] Nevertheless, some useful conclusions can be drawn from the evidence.

The courts seem to have been little inclined to move about. One exception was in the summer of 1530 when at least two sentences were passed by the official of Lothian sitting at Musselburgh, just outside Edinburgh,[2] and so it may have been that the court was obliged to quit the city in the face of a worsening of the pestilence which had broken out there in May;[3] certainly the exchequer had retreated to Linlithgow in July because of 'the pestilence now regnand in Edinburgh'.[4] There is, however, no sign of a move in 1545 when another outbreak of plague drove the court of session to Linlithgow,[5] but as this period is quite undated in the Lothian Sentence Book it is possible that the court may have temporarily suspended its operations.[6] A further period of crisis

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1. E.g. the date 29 July 1544 is next followed by 11 March 1545/6 (Sent. Laud., fos. 325r, 328v).
2. Ibid., fos. 176r, 176v. There is one sentence recorded between these two, and so it may have been passed at Musselburgh also. These sentences are undated, but the dates 6 July and 17 November on fos. 175v and 177r respectively suggest that they occurred during the summer.
3. Diurnal of Occurrents, 14.
4. ADCP, 331-2.
5. RPC, i, 5.
6. For the effect of recurrent plagues on the London church courts, cf. Wunderli, London, 21-23.

for Edinburgh occurred in May 1544 when the English landed at Leith and burned the capital. Again the dating of the entries is patchy, but as some fifteen sentences were passed between the end of January and the end of July in that year it does not seem as if the court suffered any severe disruption. The presence of a small burn hole in the middle of folio 324, shortly before the July date, is an attractive if coincidental reminder of this episode in the history of Edinburgh.

The number of sentences passed in an official's court over any given period is not a perfect indication of its activities during that time (after all, no sentences were passed between October and December 1546), but it can tell us something about the current circumstances of the court. For an action to come to sentence there was required the co-operation of many different people and the correct performance of many complicated procedures; witnesses had to be produced and documents studied, parties had to be cited and procurators briefed, numerous diets would be assigned and observed, and the judge and his officers had to be in constant and efficient attendance. Given sufficient disturbance of either the court or of current social conditions it would become increasingly difficult, if not impossible, to obtain a sentence.[1] It is therefore

1. It might also be argued that in times of extreme national crisis people are less inclined to litigation anyway, but this does not seem to have been the case with the people of Edinburgh in 1548 when the English were at the gates.

intersting to compare the relative number of sentences passed during the years of the 1530s and 1540s. Sentences in the Lothian court were sufficiently well dated to enable us to isolate the periods between January and January in each of the successive years of the 1530s: ranging from seventy-three sentences passed in 1535 to the thirty-eight passed in 1534, the average number for each of the ten years between January 1531/2 and January 1541/2 was about fifty-six sentences. Forty sentences were passed in 1543 but thereafter the dating, and even the order,[1] become increasingly erratic. For the period of more than nineteen months between the end of July 1544 and March 1546 only seventeen sentences are recorded; between March 1546 and March 1547 there were only seven; the following year the figure rises to twenty-four, drops to nine between March 1548 and January 1549 and then begins to rise again. For the final year covered by the Sentence Book, June 1550 to July 1551, the figure is back to fifty and the pattern seems to be settling down again.

In the principal's Sentence Book more conscientious dating allows us to divide the sentences into groups of six months - generally from January to June and from July to December. Between January 1542 and May 1546 each of these half-yearly periods saw an average of twenty-two sentences passed on first instance cases and ten on appeals. The last sentence in this period was passed on 11

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1. See above, 19-20.

May 1546, less than three weeks before the murder of Cardinal Betoun; there then occurs a break until 11 August, after which eleven more sentences were entered before the end of the year. Of these eleven only four were in first instance cases. In the whole of 1547 there were only six sentences on first instance cases and six on appeals, but the numbers then begin to rise and the six-monthly averages for the period between the summer of 1548 and the summer of 1553 amount to about nineteen in first instance cases and nine in appeals - little short of the averages in the early years of the decade.

What can we learn from these somewhat confusing figures? The most obvious, and perhaps predictable, feature seems to be that the records reflect a period of severe crisis in the mid-1540s, extending from the summer of 1546 to the summer of 1548 in the case of the court at St Andrews, and from perhaps 1545 to 1548 in the case of the Lothian court. In the principal's court this crisis is particularly noticeable in first instance cases which, having previously outnumbered appeal sentences by two to one, then slumped to half their number in the latter part of 1546. This suggests that the decline in the number of sentences is perhaps attributable less to the disruption of the court itself, which would have affected both types of action equally, than to the effect of current events on those people who would normally bring actions at first instance in the principal's court. If the number of new actions being raised in St Andrews was dramatically reduced, the result would only begin

to show itself in a decline in the number of sentences some months later, and this is what seems to have happened. From the burning of Wishart in March 1546 through the murder of Betoun and the siege of the castle to its capture by the French in July 1547 St Andrews must have been an exceedingly uncomfortable and unstable place; thereafter the situation should have begun to return to normal. It was not, in fact, until the latter part of 1548 that the number of sentences in the court of the official principal returned to something like its 'pre-crisis' level.

For the Lothian court the crisis seems to have begun suddenly with the appearance of the English at Leith in May 1544. The prudent merchant who removed his goods to Dalmahoy had little time in which to make up his mind; he quit Edinburgh on 3 May, just one day before it was taken and burnt by the English. Although this disaster does not seem to have had any immediate effect on the court, it was only the beginning of a long period of uncertainty for the whole area. The plague of 1545 was followed by renewed incursions by the English who would not be effectively contained until the arrival of French forces in the summer of 1548. The precise effect on the church court in Edinburgh of the murder of Betoun and the ecclesiastical crisis of 1546 is difficult to assess. The number of appeals from the Lothian court reaching sentence in St Andrews dropped from twelve in 1543 to five in 1546 and to only one in 1547. Allowing for the delay between lodging an appeal and achieving sentence these figures suggest that the crisis in the Lothian

court, or at least the crisis among Lothian court litigants, was already taking effect in 1545. This would seem to be the significance also of the fluctuations in the number of sentences in the Lothian court itself. The fact that only seven sentences were passed between March 1546 and March 1547 suggests that the greater part of the seventeen that were recorded between July 1544 and March 1546 belong in fact to the earlier part of that undated period. Certainly the lack of sentences in 1546 would be a reflection not of the events of that year but of those of 1544 and 1545; no sentences were passed in the autumn of 1546, but it is clear that the court was by then both active and busy. Indeed, the increase in the number of sentences, uncertain but unmistakeable, that begins in 1547 suggests that things were already returning to normal in the Lothian court before the summer of 1546.

We do not need the evidence of the Sentence Books to know that the mid 1540s was a period of crisis for Scotland, but that is not the whole of their message. The court records reflect to a considerable extent the pre-occupations of ordinary people, and the events that concern the history books appear to have made little impression; although in times of severe crisis these pre-occupations may have been put aside, they did not remain so for long, and while the French might be besieging St Andrews castle the good people of the town continued to slander each other and to seek recompense in

the courts.[1] The records also tell us something about the courts: firstly, that they continued to function under all except the very worst conditions, and secondly, and most important, that despite all the disasters of the 1540s, and despite the shocks sustained by the church, the activity of the courts very quickly recovered its momentum afterwards, and when the records end in the early 1550s it was following an upward curve. This is in striking contrast to the fortunes of the church courts in London and Canterbury, where business was in a steady decline from the earliest years of the sixteenth century,[2] and is a testimony both to the vigour of the officials' courts in the diocese of St Andrews and to the importance of their contemporary role.

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1. Sent. St A., fo. 157r. Cf. the situation at Canterbury: 'another feature of the operation of the courts is the lack of any evidence to suggest that they suffered any disturbance from political disorder', (Woodcock, Canterbury, 109).
2. Cf. Woodcock, Canterbury, 109-10; Wunderli, London, 24-25.

C O N C L U S I O N

C O N C L U S I O N

It was suggested at the beginning of this thesis that its purpose could not be more than one of providing a general introduction to the subject of the church courts based on the surviving records of the officials of St Andrews. Such an introduction must necessarily be biased because these records are in many ways untypical. The court of the official principal, situated as it was in the primatial centre of St Andrews, held a pre-eminent place among the church courts of Scotland - even though its jurisdiction was confined to the province of St Andrews; the court of the official of Lothian was established in the capital, and largest city, of Scotland and clearly dealt with business of a type and on a scale such as would not be found in the more remote ecclesiastical jurisdictions. Nevertheless, if we have to be limited to so few records, it is the records of St Andrews that we would most wish to have; no others could give us so clear a picture of the extent and scope of the church's jurisdiction on the eve of the Reformation.[1]

What conclusions may be drawn at this stage? The first point that suggests itself is the extent to which the courts served the interests of the lay community. Seventy per cent of all

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1. For a summary of the state of the church on the eve of the Reformation, cf. Donaldson, Reformation, 1-28.

sentences passed in the Lothian court during the 1540s, and almost half of those in the principal's court, were concerned with such mundane matters as the transference of contracts, the hearing of debt cases, the supervision of testamentary obligations and the satisfaction of testamentary debts.[1] These were important matters for any community and went beyond the mere provision of a small debt tribunal; the certainty that the terms of a testament would be implemented and safeguarded after death, or that a widow or infant children would not be defrauded of their rights, was a vital social function, while the smooth transfer of contracts and other obligations to an heir or executor gave a degree of certainty to all business transactions. The courts contributed more than the settlement of disputes. The degree of certainty imparted to business contracts by the courts' supervision of testamentary affairs was reinforced by their role as courts of record. Registration in the books of an official gave to a contract or obligation, however minor, not only the support of judicial sanction but also the status of an act of court that could be inherited or transferred like the most formal of written undertakings. Finally, the courts exercised important administrative functions quite separate from their judicial processes: executors and curators were appointed for those in need, a suitable venue was provided for the recognition of charters and other acts, and an extensive copying and transumpt service was provided by the clerks.[2]

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1. See above, 174-7, 140-6.
2. See above, 177-8.

This leads us to a second point, which is that the courts not only met a communal need but they also satisfied a popular demand. This can be seen in matters other than the purely commercial or contractual. Actions for defamation provided a small but constant source of litigation throughout the 1540s and are a measure of the importance placed on public reputation by mediaeval society. The great majority of cases where the slanderous words were recorded are no more than examples of common abuse and, although there may have been occasions when defamation was calculated and deliberate, it is difficult to see in many of them anything more than the language of a public slanging match. The problem was, of course, that such abuse was public, and a person's reputation in the community might well depend on securing a public retraction - to say nothing of the risk that the slander might find credence with the disciplinary authorities of the church. This perhaps explains why so many of these cases were settled by the imposition of a public penance, often in the place where the slander was committed, rather than by the levying of a fine in compensation. It was a public retraction that could best heal such injuries and it was the church court which was the one that could achieve it.

It has been said of the English church courts that, of all their ex officio work, 'the correction of fornicators, adulterers, quarrellers and common defamers probably received the largest measure of popular support, and the solemn penances which judges imposed gave satisfaction to the congregation and cleansed the

festering sores of local enmity'.[1] The St Andrews officials were not concerned with ex officio inquiries, but what was true of common defamers applied equally to the tensions created by dubious marriages. Archbishop Hamilton's complaint about the difficulty faced by those of good family who wished to marry outwith the forbidden degrees[2] called attention to the plight of all classes of society living in small or restricted communities and, although we cannot tell how far down the social scale the canonical rules of kinship presented a real problem, there is no doubt that the courts fulfilled a vital role in going some way to resolving the uncertainties created by the canon law on marriage.

To propose the 'cursit consistorie' as an early form of community court might seem absurd, but it is perhaps not as far from the truth as might at first seem the case. The courts, as we have seen, did not cater either for the very great or for the very humble, but it may be possible to think in terms of there having been two particular types of litigant before the officials. If there was one thing held in common by all those who criticised the courts' oppression of the 'poor man' it was that none of them were poor. Poor men did not contest suits by the endless succession of diets listed by Lindsay,[3] nor did they obtain diffinitive sentences that

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1. Houlbrooke, Church Courts and People, 263.
2. See above, 137.
3. See above, 288.

were liable to be frustrated by the appeals to Rome so disliked by the temporal lords;[1] the litigants most likely, in proportion to their numbers, to do both these things were those who came from the ranks of the burgesses and lairds.[2] It may not be entirely coincidental that the class which stood to suffer most in terms of delay and expense from the tortuous procedure of the ecclesiastical courts was the very class which provided the hard core of the anti-clerical faction in those confused days we now know to have been the beginning of the Reformation.[3] On the other hand, the majority of the users of the officials' courts were conspicuous by their very ordinariness. We have to think now in terms of the Lothian court because the principal's Sentence Book records only those who obtained sentences; but in the Edinburgh court less than five per cent of those who registered an action (as opposed to those who contested one by plenary procedure) were men of any obvious rank, while the number of such men involved in the minor acts of monition is almost negligible. Not even the senior ranks of the clergy made use of the courts, unless to pursue for unpaid teinds, and the great part of clerical litigation was confined to the humbler clergy, to the curates and chaplains, and their humble disputes. The absence of any significant number of appeals is another indication of the relatively modest status of the majority of litigants. It is not surprising, therefore, that political events left so little direct

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1. See above, 288.
2. See above, 300-1.
3. Donaldson, Reformation, 54.

mark on the records of the court; the majority of the people who used the court facilities were those for whom such events had only indirect bearing. Although for a time there was a significant drop in litigation in both courts,[1] the crisis was not a permanent one, and when it passed the people showed their endorsement of the church's jurisdiction in the most convincing way possible - by turning to it once again for the settlement of their affairs.

The inadequacies of the church courts were probably most apparent to a minority of wealthier litigants but for the majority the officials must have fulfilled an important communal need; this alone, however, cannot account for their strength in the 1540s. English church courts, which had also dealt with great numbers of actions for debt and testamentary debt in the fifteenth century showed, from the beginning of the sixteenth, every sign of steady and irreversible decline.[2] The courts of the St Andrews officials showed no such symptoms; they survived the troubled years of the mid 1540s without lasting injury and appear to have been making a steady recovery when we lose sight of them in the early 1550s. This strength must have owed in part to the absence of any rivalry such as the English courts encountered in the common lawyers. A decade before the Reformation the English courts had ceased to handle straightforward actions for breach of faith in any significant quantities, and actions for testamentary debts had been almost

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1. See above, 318-22.
2. Woodcock, Canterbury, 109-10; Houlbrooke, Church Courts and People, 39; Wunderli, London, 305-6.

entirely taken over by the royal courts.[1] The resulting loss of business, and of revenue, can only have served to lower both the morale and the standards of the courts.[2] Not only did the Scottish courts not have to contend with competition on this scale but they were themselves closely allied to the civil jurisdiction. In terms both of procedure and personnel the court of session and the ecclesiastical court of Lothian had developed a remarkable harmony, and if this situation was peculiar to Edinburgh the evidence still suggests that in other centres co-operation remained a guiding principle for the courts of both lay and ecclesiastical jurisdictions.[3] The courts spiritual were not only an important part of the national judicial system but they were also one of the chief ingredients on which that system was founded.

It may, therefore, be not unreasonable to suggest, as we did in the Introduction,[4] that the abolition of the church courts could only be followed by a disastrous dislocation of the national judicial system. Unfortunately, history does not permit the proposition to be left there; the church courts were effectively closed in 1560 and, although there was some disruption, judicial anarchy did not ensue. How did Scotland manage without the officials' courts? To answer this question in any detail would be to trespass beyond the confines of this thesis, but some explanation

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1. Houlbrooke, Church Courts and People, 102.
2. Woodcock, Canterbury, 109-10.
3. See above, 274-80.
4. See above, 1.

should be offered. The immediate effect of the lapsing of the officials' jurisdiction was that cases either passed to the court of session or remained unheard; it seemed for a time that the consistorial jurisdiction might be inherited by the newly established Superintendents,[1] but there was clearly an urgent need for a more permanent solution and to this end the commissary courts were established in 1564.[2] These courts were designed to fill the gap left by the officials' courts from which, in effect they differed little. They were entitled to hear causes which had already been initiated before the officials, to hear actions for teind and testament, to appoint executors and curators, to act obligations and to register contracts, and to hear all causes which 'were formerly adjudged and decided in the consistory'.[3] The procedure was to be in the vernacular and some new measures were introduced to expedite cases where a party remained contumacious; but otherwise procedure can have differed little from that used before the officials. Processes were begun by written libel or by verbal petition and proceeded to admission, denial or exception, and plenary procedure generally was to follow the rules of the court of session.[4] Finally, there was also continuity of personnel. Sir James Balfour, the last official of Lothian, became the chief commissary of the new court in Edinburgh, while in the local commissariats also many of the old ecclesiastical judges slipped smoothly into their new roles as servants of the state.[5]

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1. Donaldson, Reformation, 122-3.
2. SES, i, clxxiii-clxxviii.
3. BP, ii, 671.
4. Ibid., ii, 655-61.
5. Donaldson, 'Church Courts', 369.

Scotland did not for long have to exist without the officials' courts, even though when they returned it was under another name. It may have been that the changes required were not so great. The year 1560 has now been removed from its pedestal as the climactic birth of the Reformation in Scotland; instead it is clear that the abolition of papal authority followed a long period during which that authority had already been effectively eliminated.[1] Bishops remained in their sees after 1560 and priests in their parishes, and the whole structure of the old church remained remarkably intact.[2] Something of the same process may be seen in the church courts. Already in the 1540s the orientation of the officials' courts was heavily secular and so was that of the judges. Neither Abraham Crichton, with all his benefices, nor Thomas Coutts, with all his children, may have been good pastors but they were good judges. When the religious revolution finally came, the officials of Lothian and Glasgow, as befitted men who were lawyers first and priests second, moved naturally to head the new commissary courts of their respective cities, while Abraham Crichton was already long established on the bench of the court of session. It is not unfitting that such men should have received so prompt and unhesitating a recognition of the role that had formerly been played by them and by their predecessors in the officials' courts.

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1. Donaldson, Reformation, 37-46, 74.
2. Ibid., 72.

A P P E N D I C E S

APPENDIX I

THE TALE OF THE DOG, THE SHEEP AND THE WOLF

(From the edition of H.H. Wood [Edinburgh, 1933]. The notes are my own.)

Esope ane Taill puttis in memorie,
How that ane Doig, because that he was pure,[1]
Callit ane Scheip to the Consistorie,
Ane certaine breid[2] ffra him ffor to recure.[3]
Ane fraudfull Wolff was Juge that tyme, and bure
Authoritie and Jurisdictioun;
And on the Scheip send furth ane strait summoun.

For by the use, and cours, and common style
On this maner maid his Citatioun:
'I, Maister Wolff, partles off fraud and gyle,
Under the panis off his Suspensioun,
Off grit Cursing, and Interdictioun,
Schir Scheip, I charge the for to compeir,
and answer to ane Doig befoir me heir'.

Schir Corbie Ravin wes maid Apparitour,
Quha pykit had fful mony Scheipis Ee;
The charge hes tane, and on the letteris bure;
Summonit the Scheip befoir the Wolff, that he,
Perumptoulie, within twa dayis or thre,
Compeir under the panis in this bill,
'To heir quhat Perrie Doig will say the till'.

---

1. Poor
2. Bread
3. Recover

This Summondis maid befoir witnes anew;
The Ravin, as to his office weill effeird,
Indorsat hes the write, and on he flew;
The selie Scheip durst lay na mouth on eird,
Till he befoir the awfull Juge appeird,
The oure off cause, quhilk that the Juge usit than,
Quhen Hesperus to schaw his face began.

The Foxe wes Clerk and Noter in the Cause;
The Gled,[1] the Graip,[2] at the Bar couth stand;
As Advocatis expert in to the Lawis,
The Doggis pley togidder tuke on hand,
Quhilk wer confidderit straitlie in ane band,
Aganis the Scheip to procure the sentence;
Thocht it wes fals, thay had na conscience.

The Clerk callit the Scheip, and he was thair;
The Advocatis on this wyse couth propone.
'Ane certain breid, worth fyve schilling or mair,
Thow aw the Doig, off quhilk the terms is gone'.
Off his awin heid, but Advocate allone,
The Scheip avysitlie gave answer in the cace:
'Heir I declyne the Juge, the tyme, the place.

'This is my cause, in motive and effect:
The law sayis, it is richt perrillous
Till enter in pley befoir ane Juge suspect;
And ye, Schir Wolff, hes bene richt odious
To me, for with your Tuskis ravenous
Hes slane full mony kinnismen off mine;
Thairfoir, Juge as suspect, I you declyne.

---

1. Kite
2. Vulture

'And schortlie, of this Court ye memberis all,
Baith Assessouris, Clerk, and Advocate,
To me and myne ar ennemies mortall,
And ay hes bene, as mony Scheipheird wate;
The place is fer, the tyme is feriate,
Quhairfoir na Juge suld sit in Consistory,
Sa lait at evin, I yow accuse ffor thy'.

Quhen that the Juge in this wyse wes accusit,
He bad the parteis cheis, with ane assent,
Twa Arbeteris, as in the Law is usit,
For to declair and gif Arbirtiment,
Quhidder the scheip suld answer in Jugement
Befoir the Wolff; and so thay did but weir,
Off qhome the Namis efterwart ye sall heir.

The Beir, the Brok, the mater tuke on hand,
For to discyde gif this exceptioun
Wes off na strenth, nor lauchfully mycht stand;
And thairupon, as Jugis, thay sat doun,
Ane held ane lang quhyle disputatioun,
Seikand full mony Decreitis off the Law,
And Glosis als, the veritie to knaw.

Of Civile Law volumis full mony thay revolve,
The Codies and Digestis new and ald;
Contrait, Postrait Argumentis thay resolve,
Sum objecting, and sum can hald;
For prayer, or price, trow ye that thay wald fald?[1]
Bot hald the glose, and Text of the Decreis,
As trew Jugis; I beschrew thame ay that leis.

---

1. Fail

Schortlie to make ane end off this debait:
The Arbiteris than sweirand plane,
The sentence gave, and proces fulminait:
The Scheip suld pas befoir the Wolff agane,
And end his pley. Than wes he nathing fane,
For ffra thair sentence couth he not appeill.
On Clerks I do it, gif this sentence wes leill.[1]

The Scheip agane befoir the Wolff dereneit,
But Advocate, abaistlie[2] couth stand.
Up rais the Doig, and on the Scheip thus plenyeit:
'Ane soume I payit have befoir the hand
For certane breid'; thairto ane Borrow[3] he fand,
That wrangouslie the Scheip did hald the breid;
Quhilk he denyit; and thair began the pleid.

And quhen the Scheip this stryif had contestait,
The Justice in the cause furth can proceid;
Lowrence[4] the actis, and the proces wrait,
And thus the pley unto the end thay speid.
This Cursit Court, corruptit all ffor meid,
Aganis gude faith, Law, and eik conscience,
For this fals Doig pronuncit the sentence.

And it till put to execution
The Wolff chargit the Scheip, without delay,
Under the panis off Interdictioun,
The soume off silver, or the breid, to pay.
Off this sentence (allace) quhat sall I say,
Quhilk dampnit hes the selie Innocent,
And Justifyit the wrangous Jugement?

---

1. Honest
2. Humbly
3. Pledge
4. I.e. the fox

The Scheip, dreidand mair the executioun,
Obeyand to the sentence, he couth tak
His way unto ane Merchand off the Toun,
And sauld the woll that he bure on his bak;
Syne bocht the breid, and to the Doig couth mak
Reddie payment, as it commandit was:
Naikit and bair syne to the feild couth pas.

MORALITAS

This selie Scheip may present the figure
Of pure commounis, that daylie ar opprest
Be Tirrane men, quhilkis settis all thair cure
Be fals maeinis to mak ane wrang conquest,
In hope this present lyfe suld ever lest;
Bot all begylit, thay will in schort tyme end,
And efter deith to lestand[1] panis wend.

This Wolf I likkin to ane Schiref stout,
Quhilk byis ane forfalt at the Kingis hand,
And hes with him ane cursit Assyis about,
And dytis all the pure men up on land.
Fra the Crownar haif laid on him his wand,
Thocht he wer trew as ever wes sanct Johne,
Slain sall he be, or with the Juge compone.

---

1. Lasting

This Ravin I likkin to ane fals Crownair[1]
Quhilk hes ane portioun of the Inditement,
And passis furth befoir the Justice Air,
All misdoaris to bring to Jugement;
Bot luke, gif he wes of ane trew Intent,
To scraip out Johne, and wryte in Will, or Wat,
And take ane bud[2] at boith the parteis tat.[3]

Of this fals tod, of quhilk I spak befoir,
And of this Gled, quhat thay micht signify,
Of thair nature, as now I speik no moir;
Bot of this Scheip, and of his cairfull cry
I sall reheirs; for as I passit by
Quhair that he lay, on cais I lukit doun,
And hard him mak sair lamentatioun.

'Allace' (quod he), 'this cursit Consistorie,
In middis of the winter now is maid,
Quhen Boreas with blastis bitterlie
And hard froistes thir flouris doun can faid;
On bankis bair now may I mak na baid'.
And with that word in to ane coif he crap,
Fra sair wedder, and froistis him to hap.

Quaikand for cauld, sair murnand ay amang,
Kest up his Ee unto the hevinnis hicht,
And said, 'Lord God, quhy sleipis thow sa lang?
Walk, and discerne my cause, groundit on richt;
Se how I am, be fraud, maistrie,[4] and slicht,
Peillit[5] full bair': and so is mony one
Now in this warld, richt wonder, wo begone!

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1. Coroner
2. Bribe
3. Exact
4. Tyranny
5. Stripped

Se how this cursit sone of covetice,
Loist hes baith lawtie and eik Law.
Now few or nane will execute Justice,
In falt of quhome the pure man is overthraw.
The veritie, suppois the Juge it knaw,
He is so blindit with affectioun,
But dreid, for micht, he lettis the richt go doun.

Seis thow not (Lord) this warld overturnit is,
As quha wald change gude gold in leid or tyn;
The pure is peillit, the Lord may do na mis;
And Simonie is haldin for na syn.
Now he is blyith with okker[1] maist may wyn;
Gentrice is slane, and pitie is ago,
Allace (gude Lord) quhy thoilis[2] thow it so?

Thow tholis this evin for our grit offence,
Thow sendis us troubill, and plaigis soir,
As hunger, derth, grit weir, or Pestilence;
Bot few amendis now thair lyfe thairfoir.
We pure pepill as now may do no moir
Bot pray to the, sen that we are opprest
In to this eirth, grant us in hevin gude rest.

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1. Usury
2. Suffer

It is clear from this fable that the author had some detailed knowledge of the operation of the church courts. If we leave aside the elaboration and exaggeration of what is primarily a social satire, we find a comparatively coherent account of a legal action. The dog requested from the judge a citation on the sheep (l. 7), and the sheep was summoned to appear in court and answer the dog's petition under the successive pains of suspension, excommunication and interdict (ll. 10-14). The citation was taken by the apparitor and, when the sheep had been publicly and peremptorily cited, was duly endorsed as executed (ll. 15-24). The court assembled with the clerk and procurators in attendance (ll. 29-30), the clerk called the sheep's case (l. 36) and the dog's procurator propounded the claim. The sheep was not represented by a procurator but he clearly knew some law; he declined the judge as partial, and the court as having been improperly constituted so late in the evening (ll. 42-56). This exception was referred, unusually, to arbiters who made great play of consulting all the relevant text-books of canon law before deciding that the exception was invalid and that the sheep should answer the dog's claim (ll. 64-82). The dog repeated his libel and the sheep had no alternative but to deny it and to contest the action (ll. 91-92).

So far Henryson had been remarkably faithful to the proper legal forms as he described the sheep's misfortune; but at this point, perhaps fearful of losing his reader's attention, he

used his poetic license to telescope the process. Apart from noting that the clerk recorded all the acts and processes (l. 94) he proceeded straight to the pronouncing of sentence and to what was presumably monitorials to compel payment of the debt (ll. 100-1). Cosmo Innes also used a certain license when he described the poem as 'the best account we have' of church court procedure, but it remains a vivid and not inaccurate picture of those aspects of the process which would have been most notable to a layman.

APPENDIX II

(i) THE OFFICIALS OF ST ANDREWS 1539 - 1553

The following notes are designed as a background to the careers of the men who served as officials in the diocese of St Andrews during the periods under particular consideration, from 1539 to 1551 in the officialate of Lothian and from 1541 to 1553 in the principal officialate. A full list of the names and dates of the sixteenth-century officials of St Andrews may be found in Watt, Fasti, 324-6.

John Weddell, official of Lothian 1533-40

Weddell occurs as sub-dean of Moray 1508-9, and 1516x17 (Watt, Fasti, 232), and as a canon of Moray 1517 (St A. Acta, 324); was rector of Flisk by 1523 (ibid., 343), and served as rector of St Andrews University 1518-19, 1524-29, 1530-31 (ibid., ccxlvi-ccxlvii).

Qualified as licentiate in utroque jure (Sent. Laud., fo. 214v), Weddell began his judicial career as commissary of St Andrews 1516x17 (Watt, Fasti, 328), served as official principal of St Andrews 1517-23 and 1530-33 (ibid., 324-5) and as official of Lothian 1533-40 (ibid., 326); elected senator of college of justice 1548 (ADCP, 574).

Abraham Crichton, official of Lothian 1540-53

Crichton was third son of Adam Crichton of Ruthven and of Elizabeth Stirling of Keir (Scots Peerage, ii, 324); by his grandmother Agnes Hepburn he was related to the earl of Bothwell (ibid., ii, 324; St A. Form., ii, 326). Adam Crichton was 'beloved uncle' to the Alexander, Lord Hume (Scots Peerage, ii, 324) who presented Abraham to the provostry of Dunglass. This preferment was contested by a nominee of Lord Maxwell, and the issue was decided against Crichton by a sentence of the official of Lothian, 8 April x 20 May 1536 (Sent. Laud., fo. 248r). Obtained possession of provostry 27 August 1537 (Watt, Fasti, 356; St. A. Form., ii, 50-55). Had acquired rectory of Crawfordjohn, Lanarkshire, by 12 February 1531/2 (RMS, ii, no. 1388), and still in possession 1538-39 (Works Accts., 238); acquired the rectory of Chirnside, Berwickshire, by 15 August 1532 (RSS, ii, no. 1388), the rectory of Upsettlington, Berwickshire, by c. 1538 (St A. Form., ii, 53), and the vicarage of Aberlady, East Lothian, after 22 February 1552/3 (RSS, iv, no. 1912). Crichton still retained the benefices of Dunglass, Chirnside, Upsettlington and Aberlady in 1561 (Accounts of the Collectors of the Thirds of Benefices, 1561-72 [SHS, 1949], 88), and was in possession of the vicarage of Strageath, Strathearn, at death (RSS, v, no. 2721).

Crichton appeared as procurator in Fife sheriff court 23 September 1518 (Fife Court Book, 147), in Dunfermline regality

court 31 July 1532 (Dunfermline Court Book, 69), and in the court of session on behalf of the archbishop of St Andrews 16 December 1532 (Acta Sessionis [Stair], 29). Was official of Lothian 1540-53 (Watt, Fasti, 326) and elected to college of justice 17 February 1547/8 (ADCP, 570-1). Appointed to judicial commission together with clerk register and queen's advocate 18 June 1563 (RPC, i, 238). Made will leaving money for repair of bridges at Cramond and Musselburgh (RPC, ii, 497), and died before 17 September 1565 (RSS, v, no. 2314).

Crichton had one son, George Crichton of Cluny, who was legitimised 16 March 1543/4 (RSS, iv, no. 2584), and in whose favour he made a charter on 15 August 1565 (RMS, iv, no. 1569). George Crichton died March 1573 (SRO, Edinburgh Testaments, CC8/8/3, fo. 146v).

Martin Balfour, official principal 1540-45

Balfour was nephew of Hugh Spens, official principal and provost of St Salvator's (St A. Acta, lvii n.). By 1513 he held vicarage of Cults, Fife, (ibid., 306, xxiv n.); held the vicarage of Monimail, Fife, by 1522 (ibid., 339), which he resigned before March 1547 (RSS, iii, no. 2205); held rectory of Dunino, Fife, by 3 October 1531 (St A. Acta, 366).

Balfour had long university career: licenciate at St Andrews 1498 (ibid., 268), examiner 1506 (ibid., 280), quodlibetarius 1508 (ibid., 288), assessor 1513 (ibid., 306), deputy dean of faculty of arts 10 March 1521/2 (ibid., 338), dean of faculty of

arts 3 November 1522 (ibid., 339), and held this post for twenty-three years (ibid., lvi, cclii); finally, was provost of St Salvator's 1551-53 (ibid., cclxiv). Qualifications are given on 10 October 1546 as Licenciate of Theology and Bachelor of Decrees (Sent. St A., fo. 3r), but designated Doctor of Theology from 26 November 1546 (ibid., fo. 7r).

Legal career also began as procurator, in Fife sheriff court in 1518 (Fife Court Book, 127); frequent appearances as procurator of abbey of Arbroath from February 1524/5 (Arbroath Liber, ii, 443, 462, 500). Served as commissary of St Andrews 1528, 1530, 1533 (Watt, Fasti, 328); member of a royal judicial council 22 August 1534 (ADCP, 426); official principal 1540-45 (Watt, Fasti, 325). Balfour was unable to attend the council of 1549 being 'aged and infirm' (SES, ii, 84), and was dead before 18 December 1553 (St A. Acta, lxiii n.).

John Spittal, official principal 1546-53

Little information survives about Spittal. He came from Aberdeen where he was commissary x1546 (Watt, Fasti, 25) and one of the first canon lawyers (St A. Acta, lxxiv). Held provostry of St Mary in the Fields, Edinburgh 1543-52 (Watt, Fasti, 357), and was rector of St Andrews University 1548-49 (St A. Acta, lxxiv). Qualified as Licenciate in utroque jure by 1546 (Sent. St A., fo. 150v), he served as official principal 1546-53 (Watt, Fasti, 325).

Presented by Crown to rectory of 'Eskirk', Glasgow diocese, 26 June 1551 (RSS, iv, no. 1263); occurs as rector of Clatt, a prebend of Aberdeen cathedral, 15 June 1552 (Sent. St A., fo. 260v).

William Cranston, official principal 1553-58

Cranston was dean of Merse 1543-59, throughout the period of his officialate (Watt, Fasti, 322); he was principal of King's college, Aberdeen in 1547 (ibid., 375), and provost of Seton 1549-62 (ibid., 373). Held rectory of Kemback, Fife, by 1553 (St A. Acta, lxiii n.). Attended provincial council of 1549 (SES, ii, 83) where he was designated Licentiate of Theology; was Doctor of Theology of Paris, incorporated at St Andrews 1551 (St A. Acta, 410 n.). Held provostry of St Salvator's 1553-60 (ibid., cclxiv) and was official principal 1553-58 (Watt, Fasti, 325).

A supporter of the old church, Cranston went into exile in 1560, supposedly accompanied by a large part of the St Andrews university muniments (St A. Acta, lxvii n.). 'A great favourer of papists', he was reported 'happily dead' in 1562 (CSP Scot., i, 653).

(ii) LOTHIAN COURT PROCURATORS

The following procurators are found practising in the court of the official of Lothian between October 1546 and February 1548/9. Those who appeared between October and December 1546 have the number of their appearances given in brackets.

John Abercrombie (107)
Andrew Blackstock (27)
John Coutts (38)
Sir James Denneston
Sir James Duncanson
George Fleming
John Hamilton
Andrew Hay (8)
[ ] Heriot
Sir John Ker (25)
Thomas Kincraigy, procurator fiscal (23)
Adam Lethan
Clement Machane
Thomas Muswell
John Peebles (93)
[ ] Whitelaw
James Reid
Sir Adam Sanderson
Thomas Sleichman
Peter Spens (1)
John Stevenson (19)
George Strang
Richard Strang
[ ] Simpson (4)
[ ] Tait (1)

Thomas Weddell (69)
Robert Wilson (144)
William Wightman (11)
Thomas Young (38)

(iii) PROCURATORS IN THE COURT OF THE OFFICIAL PRINCIPAL 1541-53

The number of principal's court procurators that can be established without an Act Book is very small; to the following names can probably be added one or two more from the St Andrews Acta (see above, 102).

Hugh Wishart, procurator fiscal
William Arthour, procurator fiscal
Thomas Harvy
John Robertson

(iv) PROCURATORS IN THE COURT OF THE COMMISSARY OF THE CHAPEL ROYAL

The following names appear in the surviving records of the Stirling chapel royal court, but it should not necessarily be assumed that their practice was confined to that court. John Abercrombie may well be identifiable with the Lothian procurator of that name, while Robert Learmonth may be one of the procurators of that name who practised at the Dunblane court.

John Abercrombie
Andrew Auchtermuchty
Alexander Chalmer
John Crathy
Thomas Harvy
Robert Learmonth
[ ] Listar
William Matheson

(v) PROCURATORS IN THE COMMISSARIAT COURT OF DUNBLANE 1551-55

The Dunblane court procurators seem to have been dominated by one particular family; it is not clear whether either Malcolm Drummond's or John Learmonth's appointment as procurator fiscal was on a permanent basis similar to that of the appointments of the St Andrews procurators fiscal, or whether it was an ad hoc appointment.

John Angus
Malcolm Drummond, procurator fiscal
David Gourlay
John Learmonth, procurator fiscal
Robert Learmonth Snr.
Robert Learmonth Jnr.

APPENDIX III

(i) FIRST INSTANCE SENTENCES IN THE OFFICIALS' COURTS

	Lothian 1539-51	St Andrews 1541-53
Matrimonial	24	55
Teinds and rents	41	98
Executry	110	82
Debt	105	61
Defamation	27	5
Benefices	-	11
Assault/Homicide	2	8
Contract	40	36
Parish Clerks	3	5
Absolution	2	16
Interlocutors	28	-
Other	3	7
TOTAL	385	384

(ii) ORIGINS OF DIOCESAN APPEALS TO ST ANDREWS, 1541-1553

	Upheld	Rejected
Lothian	16	45
Aberdeen	4	7
Brechin	11	4
Caithness	3	-
Dunblane	4	4

	Upheld	Rejected
Dunkeld	9	12
Moray	9	3
Orkney	-	3
Ross	2	4
Glasgow	1	1
Others[1]	3	1

Appeal related actions[2]	6
Total diocesan appeals	146
Appeals to Rome	40
TOTAL	192

1. One appeal from a sentence of the bishop of Libaria, one from the jurisdiction of Currie, one from a sentence of the previous official, and one from a sentence of the commissary-depute of the commissary general of St Andrews.
2. That is, actions retained for further hearing by the official principal after the appeal had been upheld, and actions contesting exceptions of desertion of appeal.

APPENDIX IV

The following material is designed to provide a basic illustration of some of the procedural steps discussed above in the section 'Procedure' (to which reference will be made by a page number in brackets). It consists of three parts: the first contains the three forms of citation as used by the official principal of St Andrews in the late fifteenth century which, although of an earlier date than the other material, probably differed little from the forms in use in the 1540s; the second part consists of a series of extracts from different cases which illustrate the various diets and sequences of a contested action; and thirdly the successive stages of two individual actions are given in full.

(Part 1)

These three forms of the basic citation are taken from a late fifteenth century manuscript which illustrates some of the procedural forms of the court of the official principal in the time of the Archbishop Schevez (1476-1497), and which is known as 'the common-place book of John Gray' (NLS, Adv. MS 34.7.3, fo. 30v).

Citatio in prima forma

'Officialis Sanctiandreee curato ecclesie parochialis de C seu cuilibet alteri, salutem. Vos precipimus et mandamus quatenus legittime citetis N quod compareat coram nobis seu commissariis nostris pluribus aut uno in ecclesia beati Leonardi infra civitatem Sanctiandree, die X mensis Januarii instantis hora causarum, ad instantiam de M, super sibi objiciendis responsurus et jure periturus'.

Citatio in secunda forma

'Officialis Sanctiandree curato ecclesie de C, salutem. Quia licet alias N, dicte ecclesie parochianus, de mandato nostro legittime citatus fuerit ad comparendum coram nobis certis die et loco sibi assignatis ad instantiam M responsurus, non comparuit sed se contumaciter absentavit, uno instante coram nobis dicti M procuratore et ipsius non comparentem contumaciam accusando, ipsum contumacem reputavimus quem vos contumacem presentem denuncietis citando eundem legittime quod compareat coram nobis seu commissariis pluribus aut uno in Y ecclesiam quinto die X mensis hora causarum ad instantiam M, super sibi objiciendis responsurus et jure periturus sub pena suspensionis ab ingressu ecclesie'.

Citatio in tertia forma

'Officialis Sanctiandree etc. salutem. Quia licet alias N parochianus, de mandato nostro jam unica vice pro simplice, secunda sub pena [suspensionis] ab ingressu ecclesie legittime citatus fuisset ad comparendum coram nobis certis die et loco assignatis ad instantiam M responsurus, non comparuit sed se contumaciter absentavit, uno instante coram nobis M procuratore et ipsius non comparentem contumaciam accusando, ipsum primo reputavimus contumacem secundo eundem ab ingressu ecclesie suspendabamus prout in hiis scriptis suspendimus, citando eundem Nicholaium quod compareat coram nobis seu commissariis in ecclesia hora causarum, super sibi objiciendis responsurus et jure periturus sub pena excommunicationis'.

(Part 2)

With the exception of two acts of monition all the following extracts are taken from Acta I.

i. The first illustrates the shortest, and one of the most common, of the Act Book entries, recording the point at which the libel was formally registered (205).

fo. 6r.

Eodem die Adam Brounle proponit contra dominum Archibaldum Fairbairne.

ii. The initiation of an action by means of a petition affords us considerably greater detail (205). The following example is particularly interesting since the action was preceded by the appointment of a curator to the pursuer.

fo. 22v.

Eodem die Johannes David peciit Johannem Wilsoun sibi in curatorem dari ad lites et negocia, quem judex concessit, qui juravit de fideli administratione. Et statim idem Johannes David cum consensu dicti Wilsoun sui curatoris peciit Andream Cairnis et Cuthbertum Cairnis executores saltem bonorum intromissores quondam Cristine Burne, eorumdem matris, compelli ad sibi petenti persolvere summam septem librarum monete Scocie per quondam Elenam Westoun, matrem petentis, custodie seu deponendi cause concessarum in manibus dicte Cristine per spatium duorum annorum ultime elapsorum aut circiter conservandam utilitati dicti Johannis David, prout articulatur et decreta copia; ad respondendum Jovis partibus citatis.

iii. Our next example comes from the same action and shows how, at the stage ad respondendum, the case would procede direct to litiscontestation if the petition (or libel) was simply denied by the defence (206).

> fo. 24v.
>
> In causa Davy (sic) et curatoris contra Carnis (sic) in termino ad respondendum petitioni, negata et lite contestata per Peblis procuratorem dictorum Carnis, ad ponendum et articulandum et probandum pro prima Martis parte et procuratore citatis.

iv. In the case of David v. Cairns a diet of proof was assigned immediately after litiscontestation; more usually the next diet would be simply one ad ponendum et articulandum (207), as was the case in the action of the Friars Preacher against the dean of Haddington:

> fo. 61r.
>
> In causa prioris et conventus loci fratrorum predicatorum burgi de Edinburgh et Adamson contra Myll in termino ad ponendum et articulandum litteratorie suscitato, productis articulis juramento partis prestito, ad publicandum cras parte et procuratore citatis.

v. The next diet of this action simply saw the formal publication of the 'articles' (208):

> fo. 63r.
> In causa fratrum predicatorum et Adamson contra Myll in termino ad publicandum articulos, publicatis ad probandum pro prima litteratorie instante procuratore Coutis.

vi. In the following example the defender referred the contents of the petition to the pursuer's oath before it had reached the stage of probation.

> fo. 113v.
> In causa Pety contra Broune in termino ad ponendum et articulandum litteratorie suscitato, dictus Broune retulit contenta in petitione juramento dicti Pety, ad jurandum litteratorie instante procuratore Young acceptante hujusmodi relatione.

vii. The proof of a libel generally involved either documents or witnesses; in his action against George Henrison Edward Sinclair produced both, in two successive probatory diets (211-16):

> fo. 217v.
> In causa Sinclere de Dryden contra Henrison in termino ad probandum pro prima litteratorie

suscitato, producto Alexandro Young Michaele Tulloch juramentis prestitis, et producto uno instrumento sub sigillo et subscriptione Johannis Scot publici notarii presbyteri, uno precepto saisine sub sigillo rotundo et subscriptione manuali bone memorie Jacobi Sanctiandreee archiepiscopi, et uno instrumento sub sigillo et subscriptione magistri Jacobi Murray notarii publici et repetitis eisdem in modo probationis; pro secunda litteratorie instante procuratore predicto et in pena contumacie dicti Henrison litteratorie citati.

fo. 224r.

In causa domini Dryden contra Henrison in termino litteratorie suscitato ad probandum pro secunda, productis Willelmo Ramsay de Poltoun Jacobo Sinclere juramentis prestitis, pro tertia litteratorie instante procuratore Abircrummy et in pena contumacie dicti Henrison litteratorie citati et non comparentis.

viii. Henrison appears to have conceded the action by default, but in the case of David v. Cairns the production of proof was followed by the stage ad opponendum and the statement of 'general objections' (216):

fo. 49r.

In causa David et curatoris contra Cairnis in termino ad opponendum, Peblis procurator objecit generaliter objectiones juris; ad concludendum Veneris procuratoribus Peblis et Wilson citatis.

ix. The majority of exceptions were raised at the stage ad respondendum libello (223) and a diet would be assigned to answer the exception:

fo. 14r.

In causa Hamilton contra Douglas in termino ad respondendum libello, producta exceptione, ad respondendum Mercurii procuratoribus Peblis et Wilson citatis.

x. In this particular action the pursuer's procurator declared that the exception was inadmissible (225), and the issue was left to the decision of the judge:

fo. 16r.

In causa exceptionis Douglas contra Hamilton in termino ad respondendum exceptioni, Wilson procurator dixit jura minime admittenda; ad interloquendum cras procuratoribus Wilson et Peblis citatis.

xi. A similar stage ad interloquendum was reached early in the action of Sinclair v. Dryden; in this case Henrison's exceptions were rejected (225):

> fo. 32v.
> In causa exceptionis Henrison contra Sinclere de Dryden in termino ad interloquendum, judex repulit exceptiones prout signantur; ideo ad respondendum libello Veneris procuratoribus Abircrummy et Peblis citatis.

xii. Later in the same action Henrison raised a further exception; this time Sinclair's procurator chose the alternative tactic of denying the exception and letting it pass to litiscontestation (225):

> fo. 56v.
> In causa exceptionis Henrison contra Sinclere de Dryden in termino ad respondendum exceptioni litteratorie suscitato, Abircrummy procurator negavit exceptionem et super illa lite contestata per procuratores Abircrummy et Peblis, ad probandum peremptorie ad octavum eisdem citatis.

xiii. The next three extracts concern the production of jura (228); although the effect of these objections was similar to that of exceptions, they clearly involved a different approach:

fo. 17v.

In causa Douglas contra Falsyde de eodem in termino ad respondendum petitioni, Wilsoun procurator fatebatur contenta in obligatione producta vera sed dixit summa in eadem contenta minime persolvenda propter jura et rationes dandas; ad porrigendum jura litteratorie procuratoribus Wilsoun et Wychtman citatis; et Wychtman procurator Douglas acceptavit confessata per Wilsoun procuratorem Falsyde.

fo. 18v.

In causa jurium Falsyde contra Douglas in termino ad porrigendum jura, productis juribus, ad respondendum Veneris procuratoribus Wilsoun et Wychtman citatis.

fo. 20v.

In causa jurium Falsyde contra Douglas in termino ad respondendum juribus, Wychtman procurator acceptavit jura in quantum facit [ ] et dixit eadem minime admittenda respectu petitionis et obligationis; ad interloquendum Jovis procuratoribus Wilsoun et Wychtman citatis.

xiv. In the following examples a replica was used to answer the exception. At the diet ad duplicandum the defence apparently

did not appear, or declined to avail itself of the diet, and the pursuer's procurator demanded that the diet be 'circumduced'. Note how the designation of the suit alternated between 'Wardlaw v. Wauchop' and 'Wauchop v. Wardlaw' as the initiative in the action changed hands (229):

> fo. 10v.
> In causa Wardlaw contra Wauchop in termino ad respondendum petitioni, producta exceptione, ad respondendum Lune procuratoribus Sleichman et Wilsoun citatis.
>
> fo. 11r.
> In causa exceptionis Wauchop contra Wardlaw in termino ad respondendum exceptioni, producta replica, ad duplicandum Mercurii procuratore Wilsoun et parte citatis.
>
> fo. 12v.
> In causa replice Wardlaw contra Wauchop in termino ad duplicandum, Wilsoun procurator protestabatur quod cederet sibi pro termino; ad interloquendum Veneris procuratoribus Wilsoun et Sleichman citatis.

xv. Among the longest entries in Acta I are the records of petitions for the recovery of teinds. This example is particularly

interesting as an illustration of the contraction of procedure possible in a summary process (232). The folio is slightly damaged but nothing of importance has been lost.

fo. 2r.

Eodem die magister Robertus Wynrem, collector receptor factor et procurator venerabilis patris Jacobi commendatarii perpetui prioratus ecclesie metropolitane Sanctiandree et venerabilis viri dompni Johannis Wynrem sacre theologie professoris dicte ecclesie supprioris et ejusdem sede vacante vicariorum generalium etc. specialiter constitutus, peciit nobilem dominum Georgium dominum Seytoun [and twenty-eight colleagues] et ipsorum quemlibet excommunicari et excommunicationis sententiam incidisse propter injustam intromissionem cum decimis ?[garbalibus] granorum ?[suorum] respective crescentium infra dictam terram de Kirklistoun croppe anni MDXLVI absque licentia et facultate prefati magistri Roberti collectoris receptoris factoris et procuratoris antedicti, et propter abductionem suorum granorum eisdem minime legittime decimatis [ ] et perturbatione ejusdem magistri Roberti et suorum ?[cuiuslibet] in decimatione et pacifica abductione decimarum terrarum hujusmodi post et contra tenorem litterarum monitorialium insuper

emanatarum et executarum, et propter contraventionem tenoris litterarum monitorialium hujusmodi post earumdem executionem. Et quia nulli comparuerunt, judex assignavit litteratorie ad probandum premissa et eodem die ad ponendum et articulandum partibus premunitis instante magistro Robert Wynrem predicto, et in pena contumacie omnium aliorum citatorum vocatorum et minime comparentium.

fo. 5v.

In causa petitionis summarie Wynrem contra Georgium dominum Seytoun [and seventeen colleagues] in termino litteratoris suscitato ad probandum peremptorie et ponendum et articulandum, productis Johanne Hill, Gavino Hill, Alexandro Spens, Willelmo Riche juramentis prestitis et decretis litteris super partibus citatis ob non responsionem articulis, ad opponendum et proponendum omnes litteratorie instante parte Wynrem, et in pena contumacie reorum citatorum.

xvi. The other popular form of summary action was the cedula (234-6), here seen successfully applied in the course of a single diet.

fo. 28v.

Eodem die Mariota Thomson cum consensu Isobelle Wricht sue matris peciit a Willelmo Cranstoun,

executore quondam Mariote Smyth sue sponse, unam flammeam, vulgariter 'ane lynnyn cerche', per dictam defunctam petenti legatam et detulit suo juramento, qui fatebatur et judicaliter deliberavit dictam flammeam petentibus.

xvii. Finally came the costs, decreed in this case in the silent presence of the loser:

fo. 217r.
In causa Jak contra Warrok in termino ad taxandum expensas litteratorie suscitato, judex taxavit expensas ad xix solidos et decrevit monitoriales in forma instante procuratore Wilsoun et in presencia dicti Warrok citati et tacentis.

xviii. Moving away from contested actions, the following three extracts illustrate acts of monition as they were recorded in the Lothian court and in the court of the commissary of Dunblane; the second is taken from the Lothian Acta II and is typical of the more weighty agreements that were registered, and subsequently deleted, in its pages.

Acta I, fo. 18r.
Eodem die judex monuit Johannem Young ad satisfaciendum Mariote Wallace viii solidos xi denarios in festo sancte Thome apostoli proximo.

Acta II, fo. 22r.

Quo die Johannes Ogilvy de Ballinsho monitus est ex sua propria confessione sub pena excommunicationis submittens se nostre jurisdictioni in hoc casu ad persolvendum Alexandro Guthre burgense de Edinburgh summam centum librarum monete Scocie in festo pentecoste proximo, pro quaquidem summa dictus Johannes actitatus extat in libris domini Thesaurie dicto Alexandro. [die nono mensis Februarii anno MDLII deletur penes actum de mandato Alexandri Guthre].

Dunblane Acta, fo. 5r.

Quo die monitus est Mauricius Duncane ex eius propria confessione ad persolvendum executoribus quondam Nicholaii Finlason annuatim v solidos usque solutionem xxv solidorum incipiendo primam solutionem infra hinc et dominicam quadragesime, et sic annuatim sub pena excommunicationis.

(Part 3)

i. There follow the full reports of two contested actions. There is no one action typical of the suits recorded in Acta I, but these two contain many representative features. The first was

initiated by a libel but was contested on an exception, and although no sentence was ever recorded the action did reach the assignation of a diet ad sententiandum, so it may have been settled out of court. Two features to be noted are the 'continuation', or postponement, of the first diet ad respondendum which was a common procedure, and secondly the diet 'ad reportandum' which was assigned to hear the results of the letters directed against two absent witnesses (fo. 28r).

> Acta I, fo. 8r. Wednesday 27 October 1546
> Eodem die Jacobus Hammilton proponit contra Petrum Hammilton, dato libello ad respondendum ad octavum parte et procuratore citatis.
>
> fo. 10v. Thursday 4 November
> In causa Hammilton contra Hammilton in termino ad respondendum libello, continuatur usque Lune procuratoribus Wilsoun et Ker citatis.
>
> fo. 11r. Monday 8 November
> In causa Hammilton contra Hammilton in termino ad respondendum libello, judex decrevit litteras instante procuratore Wilsoun.
>
> fo. 13v. Friday 12 November
> In causa Hammilton de Kyncavill contra Hammilton in termino ad respondendum libello litteratorie

suscitato, producta exceptione ad respondendum Lune procuratoribus Wilsoun et Ker citatis.

fo. 14r. Monday 15 November

In causa exceptionis Hammilton contra Hammilton in termino ad respondendum exceptioni, Wilson procurator dixit exceptionem minime admittendam; ad interloquendum cras procuratoribus Peblis et Wilsoun citatis.

fo. 15v. Tuesday 16 November

In causa exceptionis Hammilton contra Hammilton in termino ad interloquendum, judex admisit primam exceptionem; ad contestandum litem cras procuratoribus Peblis et Wilsoun citatis.

fo. 16r. Wednesday 17 November

In causa exceptionis Hammilton contra Hammilton in termino ad contestandum litem, negata et lite contestata per procuratores Wilsoun et Peblis, ad probandum peremptorie ad octavum procuratoribus predictis citatis.

fo. 20r. Wednesday 24 November

In causa exceptionis Hammilton contra Hammilton in termino ad probandum peremptorie, productis articulis

Henrico Polwart, Thoma Hering, Thoma Ker, Margareta Douglas juramentis prestitis et decretis litteris super Willelmo Uchitre, Johanne Hardy testibus contumacibus, ad reportandum litteratorie ad octavum procuratoribus Peblis et Wilsoun citatis.

fo. 28r. Thursday 9 December

In causa exceptionis Hammilton contra Hammilton in termino ad reportandum litteras litteratorie suscitato, productis Johanne Hardy Willelmo Uchitre testibus contumacibus quos judex decrevit absolvendos et juramentis prestitis, ad publicandum Sabbati procuratoribus Wilsoun et Peblis citatis.

fo. 30v. Saturday 11 December

In causa exceptionis Hammilton contra Hammilton in termino ad publicandum producta, publicatis ad opponendum Jovis procuratoribus Peblis et Ker citatis.

fo. 34v. Thursday 16 December

In causa exceptionis Hammilton contra Hammilton in termino ad opponendum, Wilsoun procuratour generaliter objecit objectiones juris; ad concludendum Lune procuratoribus Wilsoun et Peblis citatis.

fo. 36v. Monday 20 December

In causa Hammilton contra Hammiltoun in termino ad concludendum, ante conclusionem producto commissione de sancti Johannis de Torphicane per procuratorem Peblis et statim concluso, ad sententiandum litteratorie.

ii. The second action was initiated with a cedula and also involved the production of exceptions; in this case, however, the defence failed to make use of their diet probatory and the action reverted to ad jurandum super cedula.

Acta I, fo. 25r. Friday 3 December 1546

Eodem die Andreas Kiltray peciit a dompno Willelmo Hesliop prout in cedula danda; ad jurandum Martis partibus citatis.

fo. 26v. Tuesday 7 December

In causa Kiltray contra Hesliop in termino ad jurandum super cedula, producta exceptione ad respondendum Sabbati partibus citatis.

fo. 30v. Saturday 11 December

In causa exceptionis Hesliop contra Kiltray in termino ad respondendum exceptioni, dictus Kiltray dixit exceptionem minime admittendam de stilo presentis auditorii et per confessionem dicti

Hesliop in exceptioni; ad interloquendum Martis parte et procuratore Young citatis.

fo. 32v. Tuesday 14 December

In causa exceptionis Hesliop contra Kiltray in termino ad interloquendum, judex decrevit litteras super excipiente quia non instat, instante procuratore Abircrummy.

fo. 33v. Wednesday 15 December

In causa exceptionis Hesliop contra Kiltry in termino ad interloquendum litteratorie suscitato, judex admisit prout signantur; ad contestandum litem cras procuratoribus Young et Abircrummy citatis.

fo. 34r. Thursday 16 December

In causa exceptionis Hesliop contra Kiltray in termino ad contestandum litem, negata et lite contestata per procuratores Abircrummy et Young, ad probandum peremptorie Mercurii; et Young procurator dissenciit assignationem termini et protestabatur pro juris remedio causante brevitate termini.

fo. 38r. Wednesday 22 December

In causa exceptionis Hesliop contra Kiltray in termino ad probandum peremptorie, Abircrummy procurator protestabatur quod cederet sibi pro termino; ad jurandum super cedula litteratorie instante procuratore predicto.

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